S. HRG. 99-651, PT. 2

OIL POLLUTION LIABILITY AND COMPENSATION ACT OF 1986

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

S. 2340

A BILL ENTITLED THE OIL POLLUTION LIABILITY AND COMPENSATION ACT OF 1986

AND

S. 2799

A BILL TO CONSOLIDATE AND IMPROVE FEDERAL LAWS PROVIDING COMPENSATION AND ESTABLISHING LIABILITY FOR OIL SPILLS

SEPTEMBER 10 AND 12, 1986

PART 2

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OIL POLLUTION LIABILITY AND COMPENSATION ACT OF 1986

WEDNESDAY, SEPTEMBER 10, 1986

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 10:12 a.m., in room 406, Dirksen Senate Office Building, Hon. Robert T. Stafford (chairman of the committee) presiding.

Present: Senators Stafford, Chafee, Durenberger, Bentsen, Mitchell, and Lautenberg.

OPENING STATEMENT OF HON. ROBERT T. STAFFORD, U.S. SENATOR FROM THE STATE OF VERMONT

Senator STAFFORD. The committee would please come to order.

Good morning, and welcome to this morning's hearing on the various proposals to enact a new Federal law dealing with oilspills. This is the committee's second hearing this year on this subject. The 3rd day of hearings is scheduled for Friday, and 2 days have been reserved for markup next week.

Before we begin, there is one point I would like to make. The various proposals in this area are often characterized as establishing comprehensive oilspill response, compensation, and liability systems. In fact, many proposals are not comprehensive because they leave gaps. Some types of oilspills are excluded. Responses are limited in dollar amounts as well as other ways, and compensation is available for some losses but not others. I believe it is important to acknowledge that these programs would not be comprehensive and to identify and understand the gaps in coverage of the various proposals.

Indeed, I think the committee's primary task will be to identify and understand these gaps in coverage and close them wherever possible.

Having made these observations, I would like to begin the hearing after the opening statements of other members of the committee.

After other opening statements and before the first witness begins, I propose to place into the record a letter which I received yesterday from Governor Kunin of Vermont, who had hoped to be here but is unable to do so. (See p. 9.)

At this point, I recognize the presence of my very valued colleague and friend, Senator George Mitchell of Maine, to introduce the first witness on the witness list.

OPENING STATEMENT OF HON. GEORGE J. MITCHELL, U.S. SENATOR FROM THE STATE OF MAINE

Senator MITCHELL. Thank you very much, Mr. Chairman. I appreciate your calling this hearing, which inaugurates a series of hearings and other committee meetings on Federal oilspill legislation. This subject was deleted from the Superfund bill so that we would have a better opportunity to separately consider this complex issue.

I am pleased that the attorney general of Maine, Jim Tierney, is here to testify on this issue. As he will testify, the State of Maine has in place an oilspill compensation statute that has worked very effectively since its enactment. Due, in part, to the concerns of the people of Maine, and based on discussions with Attorney General Tierney, yesterday I introduced comprehensive oilspill legislation, S. 2799. The bill is designed to assure that State oilspill laws such as Maine's remain in place and are not preempted by Federal legislation or implementation of international protocols.

The policy of not preempting State law has long been an essential ingredient in Federal environmental law. In the recent Superfund conference we agreed to clarify that State laws should not be preempted. The Clean Air Act, the Clean Water Act, the Solid Waste Disposal Act, as well as the Superfund, all expressly reserve to the States the right to have separate and more stringent laws.

Just yesterday we heard a witness from Vermont testifying to the need to avoid preemption of States rights to set tolerances for pesticide residues under FIFRA. So this is not a matter of abstract principle, but an issue of real and concrete concern to the citizens of Maine and other States. Maine is the State with the longest coastline that has enacted specific oilspill legislation, testament to the level of interest in Maine on this important issue.

Oilspills are not just a temporary inconvenience. They can place sources of income at risk. Those who are dependent on the sea cannot afford to lose access to their catch. If an oilspill occurs, it is essential that reparations be made as quickly as possible so those who can least afford it are not called upon to bear the burden of the costs of the spill.

The legislation I introduced yesterday consolidates and expands existing law while permitting State statutes to remain intact in those States which separately choose to enact their own laws, and it provides for swift and thorough compensation.

Mr. Chairman, I know that time is short for consideration of this issue. I hope that this committee can and will act expeditiously to report comprehensive nonpreemptive oilspill legislation.

With that, Mr. Chairman, I am pleased to introduce to the committee the attorney general of the State of Maine, Jim Tierney, who is now in his second term in that office, and has been a vigorous and effective proponent and defender of Maine's oilspill laws. I look forward to his testimony, as I know you and Senator Lautenberg will, as well.

[Senator Mitchell's written statement follows:]

September 10, 1986

STATEMENT OF SENATOR MITCHELL

OIL SPILL LEGISLATION

Yesterday I introduced Federal oil spill legislation, S. 2799, that addresses the problem of damage caused by oil spills. Many coastal States already have their own laws that are designed to protect their shores from oil spills. The legislation I am introducing today builds on the State experience, but in no way preempts States from continuing to protect their citizens under State law. This legislation has been developed in close consultation with the Attorney General of Maine.

Unlike much of what Congress considers, this legislation is not in reaction to a recent disaster. It is, rather, designed to establish an improved Federal system for responding to future oil spills. We are fortunate that our shorelines have not been exposed to an accident as harmful as the 1978 Amoco Cadiz accident that occurred off the coast of France, but a country with as much coastline as the United States should be better prepared for such a possibility. This is particularly true for

coastal States, such as Maine, that are heavily dependent upon fisheries and tourism.

Currently, there are several Federal statutes that address some aspect of oil spill liability and compensation. This bill consolidates those provisions and provides a comprehensive framework for oil spill compensation and liability. This is necessary to promote more effective Federal responses to oil spills. The bill also provides more compensation to those adversely affected by an oil spill. If it is enacted, we will be better prepared to respond to these risks.

Many coastal States already have enacted oil spill programs. Maine has had an oil spill statute to protect its 3,500 miles of tidal shoreline for almost 15 years. It is the largest coastal State (in terms of length of coastline) to have an oil spill statute. That law has been used to respond effectively to over 110 oil spills, recovering costs without yet having to resort to litigation. The success of this statute, as well as other State statutes, persuades me that the Federal government should build on, not erase, State laws.

The bill affirmatively permits States to continue to use their oil spill statutes and leaves States free to subsequently enact their own laws. The bill also leaves in place State oil spill funds which many States, including Maine, have set in place. There are those who argue that such duplication is

unwarranted. However, in many areas, including protection of the environment, States and the Federal government have worked cooperatively for decades to protect the public. The Clean Water Act section 311 program, the most comprehensive of current Federal oil spill laws, is based on this principle. A new oil spill liability law should not become the first exception to this cooperative principle.

The bill creates a Federal Oil Spill Compensation Fund to pay for costs associated with cleanup of and damages from an oil spill. The fund is supported by a tax on oil receipts.

The bill also provides that States can gain immediate access to the Federal fund for up to $250,000 to respond promptly to a spill. Notification to the Coast Guard within 24 hours is the only requirement. Such direct access authority can be augmented by cooperative agreements between the Federal government and the States.

The bill holds oil tanker owners or operators liable for $420 per gross ton of capacity. For a tanker with a 200,000 gross ton capacity, this would mean a liability limit of $84 million. There is no overall liability ceiling, as there is in some other proposals. Many vessels have large capacities and therefore pose large risks, that would place their per ton liability far above any arbitrary ceiling proposed to date. More than a dozen such large ships routinely use U.S. waters. Other

vessels with smaller capacities would have a lower limit. Inland barges, which can present a great risk to the public health and the environment, are treated as tankers when they haul oil as cargo.

Lessees and permittees of outer continental shelf facilities are liable for cleanup costs plus $75 million. Owners and operators of all other facilities are liable for up to $100 million in damage.

The Federal fund would have a per incident limit of $500 million. Bills being introduced in previous Congresses had no such limit, and bills considered by the House have a $200 million per incident limit. A reasonable per incident limit is one that is likely to cover all costs of a serious oil spill. Lobstermen in Maine should not be left uncompensated because we set a limit on Fund use that is too low. Based on information that is currently available, most major oil spills occurring in the United States today would not cost more than $500 million once the shipowner's liability has been exhausted.

The bill provides for compensation for natural resource damages, including cases in which the natural resource is completely destroyed. Economic losses, such as lost profits, lost taxes, or impairment of earning capacity, are also compensable. These are important provisions to those who earn

their living from the sea, since a major oil spill can render miles of shoreline an economic wasteland.

International Protocols on oil spill liability are now pending before the Senate Foreign Relations Committee. When I testified before the Committee earlier this year, I stated my opposition to Protocols that were preemptive of States, just as I oppose preemptive Federal legislation. The legislation I am introducing today implements the Protocols to the extent that they are not inconsistent with the Federal regime, which does not preempt State laws.

Other provisions have been included to improve existing law and to accommodate concerns raised by other members and interested parties. I believe this is effective, reasonable compromise legislation that I hope will be considered by the Environment and Public Works Committee when it marks up oil spill legislation next week. Compromise is an essential ingredient in policy-making. This bill contains such compromises while preserving the rights of States to protect their citizens from oil spills.

Senator STAFFORD. Thank you very much, Senator Mitchell.

Mr. Attorney General, before we recognize you, I think, out of courtesy to our colleague, Senator Lautenberg, we should inquire if he has an opening statement.

OPENING STATEMENT OF HON. FRANK R. LAUTENBERG U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. I do, Mr. Chairman. I apologize for being tardy, but I would like to take a minute, if I may. I appreciate the interest in moving forward on this Federal oilspill bill, and I am pleased to have these witnesses testify.

Oilspills are a critical problem for coastal States, and today there is no comprehensive law for responding to them. Some States have oilspill laws and a patchwork of Federal laws do exist. International conventions are pending before the Senate as well. America's coastal States will be seriously affected by the enactment of any Federal legislation or ratification of international agreements that affect State laws, and that situation has to be addressed.

Last September, a spill of 435,000 gallons of oil in the Delaware River damaged the shores of New Jersey, Pennsylvania, and Delaware. The spill, one of the largest ever in the Delaware area, killed thousands of birds and other wildlife and left a lasting mark on the shoreline, following a weeklong cleanup.

During the 7-month period following this spill, Coast Guard statistics show that other major mechanical failures on 45 vessels caused rammings, collisions with piers, and leaking storage tanks. Following the spill last September, another tanker hit a pier and spilled 189,000 gallons of crude oil into the Delaware. Such spills reflect ships with poorly trained crews or badly maintained equipment, and such spills are a national problem. In the last year alone, we have had major spills affecting California, Texas, Louisiana, and Oregon.

We need a Federal oilspill bill, a Federal mechanism for oilspill cleanup, and compensation to aid States that are vulnerable to spills, a bill that protects our precious waterways, our oceans, marine and other wildlife from the ravages of oilspills.

Yesterday I was pleased to join Senator Mitchell and Senator Stafford in introducing S. 2799. It establishes a Federal oilspill system that covers all potential sources of oilspills. It sets out liability for oil pollution damages and establishes a fund to pay damages when compensation from polluters is not available or when damages exceed the liability limits.

This bill achieves these objectives without preempting State oilspill programs, and it has been my position for some time that Federal oilspill legislation must not undermine successful State programs. S. 2799 clearly states that it does not preempt State laws or funds.

The importance of a nonpreemption provision is underscored by the Supreme Court's decision in Exxon versus Hunt, which followed 6 years of litigation. That decision essentially preempted New Jersey taxing authority for the State's spill fund. The spill fund contested in that litigation is the same fund in New Jersey which covers oilspills. An amendment that I sponsored to the

Senate Superfund bill to prevent this preemption was adopted by the conference on the Superfund, and I urge the committee to approve S. 2799's clear statement on nonpreemption. This legislation provides a Federal solution to a serious national problem, does so without compromising the important efforts many coastal States are already making, and it is an important step forward in protecting and cleaning of the environment, cleaning up the environment from the effects of oilspills.

I am pleased again to welcome our distinguished panelists on this legislation, and particularly Mr. George Tyler, from New Jersey. George has a long and distinguished history in matters concerning the environment. He is well regarded in our State as someone who cares very much about dealing with the problems. I think New Jersey has a progressive record on legislation to protect the environment.

George, I am particularly pleased to welcome you here, and, of course, the other witnesses, as well.

I thank you, Mr. Chairman.

Senator STAFFORD. Thank you, Senator Lautenberg.

[The letter from the Governor of Vermont, previously referred to by Senator Stafford, follows:]

OFFICE OF THE GOVERNOR,
STATE OF VERMONT,
Montpelier, VT, September 8, 1986.

Hon. ROBERT T. STAFFORD,
U.S. Senator,
Washington, DC.

DEAR BOB: The hearings of your committee this week on oil spill liability and compensation legislation (S. 2340), will present an issue of great importance to Vermont as well as many other states. That issue is whether state funding and liability provisions for oil spill cleanups should be preempted by federal legislation or international conventions. We strongly oppose any statutory provision that would limit state ability to take expeditious action to respond to oil spills and to recover reasonable damages for the effects of such spills.

Federal action overriding state liability standards, state limits on liability, or circumscribing use of state funds in cleanup actions would severely curtail our demonstrated effectiveness in dealing with spill incidents. Most spills that occur in Vermont are relatively small and can be remedied by prompt action at the local level. We have developed the skills and legislative mandate necessary to do so. I appeal to you to take your customary strong position protecting state prerogatives in environmental protection.

A second issue of concern to Vermont is the extent of liability of inland barges. Current law imposes artificial restrictions on liability for spills from inland barges, such as those that ply Lake Champlain. These vessels operate in confined waters full of navigational hazards and characterized by great ecological sensitivity. It is important that any new legislation assure adequate financial responsibility on the part of barge owners and operators to provide for complete remediation of any spill.

Sincerely yours,

MADELEINE M. KUNIN, *Governor.*

Senator STAFFORD. Now, Mr. Attorney General, we are prepared to hear you. We have your written statement. We offer you the option of reading it, summarizing it, or whatever you wish.

STATEMENT OF HON. JAMES TIERNEY, ATTORNEY GENERAL, STATE OF MAINE

Mr. TIERNEY. Thank you, Mr. Chairman, and thank you for providing me the opportunity to appear before this important committee, which has traditionally served as the environmental conscience

of this Congress and of this country. I extend my particular appreciation to my own Senator Mitchell and his staff and my own staff, who worked together to draft the essential elements of the legislation which you have before you.

If I could briefly summarize my presentation, allow me to say that few people think of our State of Maine without thinking immediately of our coast, which we hold in our hands for future generations. It is an essential part of our heritage, and it goes to the essence of who we are as a State and as a people. Many of us have worked hard and sacrificed much to remain in our State, and we hold our environmental principles very dear.

I urge this committee and this Congress to continue your efforts to address the national concerns arising out of the damage and threats of damage from oilspills; while I also ask you to allow those of us who as States have fashioned successful environmental programs to not have those efforts preempted; indeed, please leave us alone.

The Maine Coastal Protection Fund has worked well for over 15 years and holds the overwhelming support of the people of our State. I am the counsel to that fund. In the last year alone, our Department of Environmental Protection has been able to respond quickly to over 100 spills of oil along our coast and other navigable waters. The cleanups were done quickly, and in addition, compensation has been provided to those adversely affected. Long litigation has not been necessary; because our State law provides for a strict, joint and several liability, the need for extended litigation has been obviated.

I urge this Senate and this committee to reject the plan forwarded and fashioned by the House counterparts. We oppose any sense of preemption. I speak for Maine as well as the immediate past Chair of the Environmental Committee of the National Association of Attorneys General, who share this view, as well.

It is also important that we avoid a vaguely worded partial preemption, which would, in essence, be a lawyer's dream. It is our experience that there are very few individuals responsible from any kind of claim who would pay without lengthy litigation if the preemption were not clear and straightforward. The House has passed legislation which would preempt States such as Maine from retaining our oilspill laws. In addition, industry representatives have also said that they support that preemption, and I urge that you reject it. So, again, principally and straightforwardly, we oppose any preemption.

The second point which I would like to especially urge you to retain in the legislation pending before you is that we be sure that all natural resource damages are entitled to compensation. In Maine, many people make their living either directly or indirectly from the sea. An oilspill that made it impossible to catch lobsters or dig clams would be a devastating hardship for many of our citizens. In addition, the effect of an oilspill on the tourist industry could be devastating, and I strongly support provisions that provide coverage for all natural resource support.

Finally, I also support the provision that provides for compensation for economic damages as well, including lost income, lost profits, impairment of earning capacity, and tax losses. Such provisions

are truly necessary if Federal legislation is to fully and adequately compensate the people should environmental damage occur.

Mr. Chairman, it is important that this Nation have leaders who are responsible and secure enough in their decision to hold to fundamental principles, and no more fundamental principle can there be than to protect our own precious State asset of our coast.

I would be happy to answer any questions that you might have.

Senator STAFFORD. Thank you very much, Mr. Attorney General. Do you still have oil terminals along the Maine coast?

Mr. TIERNEY. Yes, Senator, we do.

Senator STAFFORD. Where would they be?

Mr. TIERNEY. They are in a variety of places. Much of the oil which is transferred in Maine comes through Portland. We have not noted any diminution, for example, in businesses because we have had our State law. People, major refiners, have not sought other ports of entry because of the laws which we have.

Senator STAFFORD. Is oil still offloaded at Portland and pumped up through to Montreal?

Mr. TIERNEY. Yes, Senator.

Senator STAFFORD. I think that goes through a corner of Vermont on the way up there.

Mr. TIERNEY. Well, it might very well.

Senator STAFFORD. Is there any evidence, Mr. Tierney, that oil shippers are avoiding Maine waters because of your State law, or is there any evidence that tankers are paying more for insurance because they are coming into your waters?

Mr. TIERNEY. I certainly have no evidence of any avoidance, Senator, and this law has been very productive for 15 years. We have a cap in our fund, which, after the assessments are paid, simply levels out; and we feel that the industry is working well and is comfortable with our statutes.

Senator STAFFORD. All right, sir. Thank you very much. It was the experience of this Senator, both at one time with the Navy and later with small craft, that the major hazard we ran into was fog rather than oilspills.

Senator LAUTENBERG. Never other boats, Mr. Chairman?

Senator STAFFORD. I haven't hit one yet, anyway.

I think I will desist here so that your own Senator, Senator Mitchell, can interrogate.

Senator MITCHELL. Thank you very much, Mr. Chairman.

Thank you very much, Mr. Attorney General. One of the issues before this committee and the Congress is the interaction between the international protocols on that subject and the existence of State laws. Some of the testimony today will suggest that it is important and valuable to this Nation to have the protocols ratified and that if a price for that is preemption of State law, that we should be prepared to pay that price.

My question to you is, do you believe that the protocols are worth the price of preempting State law?

Mr. TIERNEY. Absolutely not, Senator. It is simply a question of values, and I cannot believe that this country does not hold fast to the kind of economic and environmental principles that I have discussed and that this committee has traditionally represented, that in the long run we would be able to sustain both the protocols as

renegotiated. I cannot in any way support any degree of preemption of our statutes.

Senator MITCHELL. Right. And you support the principle of nonpreemption which exists as a fundamental principle of U.S. environmental law in a whole range of other areas?

Mr. TIERNEY. Absolutely right. As I think Senator Stafford pointed out in his initial remarks, Federal Government and State government jointly have a whole series of environmental statutes in clean air and clean water, and have not had difficulties, and there is no reason why we should have difficulty here.

Senator MITCHELL. As the chief law enforcement officer of the State of Maine, working in cooperation with Federal agencies, have you encountered any difficulty, or have your public functions and tasks been impeded by the fact that the Federal Clean Air and Clean Water Acts do not preempt State law?

Mr. TIERNEY. No. To the contrary, there have been no difficulties at all.

Senator MITCHELL. None whatsoever?

Mr. TIERNEY. We have had on individual issues difficulties arise, which usually mean differing philosophies and differing standards. Maine, as you know, Senator, has a very long and very high tradition of environmental quality, which oftentimes exceeds the minimum standards asserted by the Federal Government. But in terms of developing, I think, a sense of mutual respect and ability to perform our jobs, that hasn't been a problem.

Senator MITCHELL. All right. Well, I thank you very much, Mr. Attorney General, for a very straightforward and persuasive statement, and I look forward to working with you in the future in this and other areas.

Mr. TIERNEY. Thank you, Senator.

Senator STAFFORD. Thank you, Senator Mitchell.

Senator Lautenberg.

Senator LAUTENBERG. Mr. Chairman, are we going to hear the testimony of the other witnesses?

Senator STAFFORD. Well, we thought we should give the attorney general a chance to respond because my understanding was he was pressed for time.

Senator LAUTENBERG. I am sorry, I missed that.

Senator STAFFORD. I might ask, Mr. Attorney General, if the international protocol on oilspills should be ratified, would you consider Maine adequately protected if we were able to incorporate a reservation in the protocol with respect to nonpreemption of State rights?

Mr. TIERNEY. I think my position, Senator, is simply that we be left alone. We have a good program. I would review the reservation at that time. It is a very fundamental issue for us. We live there.

Senator STAFFORD. We have the same problem, believe it or not, in Vermont, since we have a good-sized shoreline on Lake Champlain, which is some 115 miles long and extends both into Canada as well as south, and oil mostly comes into the lake on barges from New York City.

Mr. TIERNEY. Yes. Much of the debate, I think, on this issue focuses on large tankers, but the actual reality of our experience is that many of the spills are very small and are very localized, which

some people might say might not rise to a great level, but if you are on the receiving end of that spill—if it is your beach, the place where you dig clams, it is your boat, it is your cottage—believe me, it is great indeed. I think that one of the problems of moving simply to a federal system is that those smaller, more routinized situations would, first of all, not be cleaned up and, second of all, the compensation would be very long in coming.

Senator STAFFORD. All right. Thank you.

Senator Lautenberg.

Senator LAUTENBERG. Mr. Chairman, thank you. I will just say that I, too, agree with Senator Mitchell, that your testimony, Mr. Attorney General, was very forthright. Coincidentally, of course, we support your position on preemption, New Jersey having a similar interest, also a State that treasures its shoreline, and has enormous dependence, despite the notion to the contrary, on our coastlines for much of our livelihood. We have a substantial fishing industry; we have substantial shore resort interests. So I thank you and assure you that, in terms of this Senator, that we are going to be talking about very similar things to that which you request. I thank you for your being here.

Mr. TIERNEY. Thank you, Senator.

Senator STAFFORD. Thank you, Senator Lautenberg.

Well, Mr. Attorney General, we have one final question, and then we will express our thanks to you and allow you to get back—I guess it's "down"—to Maine.

Mr. TIERNEY. Yes, that's correct, Senator.

Senator STAFFORD. You say in your statement that you support coverage of onshore facilities by the Federal law. Testimony from the Coastal States Organization states that, "Federal law should apply to facilities located outside and State law should apply to facilities located inside State territory."

Would you comment on your apparent belief that coverage of onshore facilities by the Federal statute is desirable?

Mr. TIERNEY. Yes, I think that's desirable, Senator, but not at the expense of preemption of State law. We think we have a system that works, and we think that this committee and the Senate should hold fast and should not negotiate too much too soon. We think the people of the country are behind this program, and I think Senator Mitchell and yourself and Senator Lautenberg do have the finger on the appropriate public policy here.

Senator STAFFORD. All right, sir. Thank you very much.

There are no further questions, Mr. Attorney General. Thank you for joining us.

Mr. TIERNEY. Thank you, Senator.

Senator STAFFORD. The next witness will be Mr. Arthur Rocque, Jr.—I hope I have not mispronounced the name—Chairman Emeritus, Coastal States Organization.

I understand you are accompanied by Mr. David Slade, counsel. Am I correct?

Mr. ROCQUE. That is correct, Senator.

Senator STAFFORD. All right, Mr. Rocque, we would be glad to hear from you. It would be the Chair's intent, unless my colleagues object strenuously, to hear all of the remaining witnesses before we start asking questions.

Is that agreeable?
[No response.]
Senator STAFFORD. All right. Mr. Rocque.

STATEMENT OF ARTHUR J. ROCQUE, JR., CHAIRMAN EMERITUS, COASTAL STATES ORGANIZATION, ACCOMPANIED BY DAVID SLADE, COUNSEL

Mr. ROCQUE. Thank you, Chairman Stafford, Senator Mitchell, Senator Lautenberg. First, I am honored to be here before this committee, as Mr. Tierney said, a committee that has shown leadership on these and many other environmental issues, and we look forward to working with this committee on this very important piece of legislation.

I am here today representing the Coastal States Organization, which is a membership organization made up of the Governors' delegates of 35 coastal States, 24 of which have oilspill compensation and liability programs planned and/or legislation, 17 of which have no liability limits.

With your permission, Chairman Stafford, what I would like to do is to summarize the written statement that has been submitted for the record, and go down the points of consensus at which CSO has arrived.

Senator STAFFORD. Mr. Rocque, that would be very agreeable to us. We will place your entire statement in the record.

Mr. ROCQUE. Thank you, sir. The Coastal States Organization, through the good services of David Slade, has looked at this issue from the international perspective through the protocols. We have met with the members of the Department of State, the Coast Guard, and the U.S. Department of Transportation. We have met on this issue on a number of occasions by ourselves. While I would defer to my colleagues from Maine and New Jersey on specific points, what I am going to offer here is a general consensus that has been developed by CSO on this issue.

In short, the Coastal States Organization can support domestic oilspill legislation if it clearly and specifically provides for the following: First, that the Federal system cover vessels and Outer Continental Shelf and deepwater port facilities only, leaving all facilities onshore and in State waters under the jurisdiction of State laws; in other words, not unreasonably preempt existing State authorities on those or over those facilities;

Second, the State's authority to establish a compensation fund with the same, and possibly broader, purposes of the Federal and international funds should be preserved. That goes beyond grandfathering, in that those States that have not yet adopted those funds or established those funds should be allowed to do so.

Senator STAFFORD. Mr. Rocque, I had not intended to ask a question at this time, but before I forget, on your first point, would it be your intention that Federal law not apply even if a State had no law in this area?

Mr. ROCQUE. No, sir; not to preempt existing State law.

Senator STAFFORD. You do not want to preempt, but you would not——

Mr. ROCQUE. Right.

Senator STAFFORD. In the presence of a vacuum, you would not want the Federal law not to apply? Am I right on that?

Mr. ROCQUE. Absolutely. I think that the example that was used on the Clean Air Act was a good example, where the Federal and the State laws work together in conjunction and where the Federal law takes precedent where there is no State law.

Senator STAFFORD. The way you first stated that, I was afraid you did not want any Federal law to apply at all if there were none.

Mr. ROCQUE. I am sorry for that misconception.

The third point would be to preserve State authority to finance compensation funds by taxing oil landings at a rate determined by the State without any Federal limitations.

A fourth point is the Federal liability limits for U.S. tankers and foreign tankers not otherwise covered by the protocols be set equal to the limits set forth in the protocols or at $60 million, whichever is greater.

The next point is a point that is near and dear to the State of Connecticut, and I understand, Mr. Stafford, also to the State of Vermont. The liability limits for inland oil barges in the current House bill they are $150,000 max, or $150 per gross weight ton. They should be raised to a limit that is comparable to those of oceangoing tankers. As you pointed out in your opening remarks, and as the Governor pointed out in her letter, it doesn't make any difference the size of the barge, the spills carry the same level of costs to clean up.

The next point is that in cases of negligence of misconduct, as warranted, liability be unlimited. I think that the basic purpose of oil spill legislation is specifically to self-police the industry, and I think that if there is misconduct, then liability should not be limited.

CSO would also like to see State courts clearly recognized as competent to hear cases under the protocols and under the Federal legislation, not preempt State courts.

The next point is that States should have immediate access up to, say, $50,000 per incident to the Federal fund to initiate cleanup and abatement response as an on-the-scene response rather than waiting for a Federal coordinator to arrive on the scene.

We also believe that the international Federal and State funds should be stacked; that is, damages that exceed the liability limits of the shipowner would first be payable from the international fund, then the Federal fund, and so on, so that we can maximize the liability ceiling. In this way it would appear that the funds would cover the maximum amount of any spill that we have known to date. It looks like the liability limits are set high enough.

We also believe that the States should have consultation rights or mutual determination with Federal officials when determining when a spill has been fully cleaned up, to determine specifically when clean is clean.

We believe also that the States should have the express authority to legislate oil spill liability as a State offense up to the Federal limits.

Further, the States should have the express authority to require proof of financial responsibility to State officials. The proof for a

State official of satisfying the Federal financial responsibility requirements are sufficient in that regard.

Last but not least on this laundry list, we believe that the 1851 Limitation of Liability Act should be either preempted or repealed so as not to provide confusion.

With respect, that summarizes the CSO position on these issues, Senator Stafford. I would be happy to answer any questions. Again, I would defer to the individual States that are represented here today on their specific interests. This does represent the majority opinion of the States, however.

Senator Stafford. Thank you very much, Mr. Rocque.

We will turn next to Mr. George J. Tyler. Senator Lautenberg, would you care to introduce him?

Senator LAUTENBERG. Only to say, Mr. Chairman, that George Tyler represents New Jersey's present view on the environment and we think that whenever the opportunity arises to develop legislation that does a good job, George Tyler has been an outspoken and eloquent advocate for legislation that enables the communities to protect themselves while at the same time making very clear to the people in the business world who have involvement with such products, what the course of their liability is and the protocols are that they have to be aware of. I am pleased to welcome George here. We have worked together on lots of environmental issues, and I look forward to his testimony.

Senator STAFFORD. All right, Mr. Tyler, we would be glad to hear from you.

STATEMENT OF GEORGE TYLER, ASSISTANT TO THE COMMISSIONER, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, ACCOMPANIED BY LARRY SCHMIDT, DIRECTOR OF PLANNING

Mr. TYLER. Mr. Chairman, Senator Mitchell, Senator Lautenberg. Thank you, Senator for those kind words. I might add you are also an eloquent spokesman on behalf of the environment, and it is a pleasure to be before you on yet another important issue to the State of New Jersey.

As noted, I am George Tyler, assistant to the commissioner of the New Jersey Department of Environmental Protection. With me this morning is Larry Schmidt, who is the Director of our planning group, and they have been following and working with Federal officials on oil spill legislation for a number of years. I am here representing Commissioner Dick Gouling and the Department of Environmental Protection.

The State of New Jersey has been following with great interest and great concern the legislative proposals in the House of Representatives and in the U.S. Senate which would provide a comprehensive framework for oil spill liability and compensation. As a coastal State, New Jersey should benefit greatly from the passage of comprehensive oil spill liability and compensation legislation. Our beaches and out wetlands are very important and vital environmental resources and a very important part of New Jersey's economy.

On the Federal level, comprehensive legislation will replace a patchwork system of existing spill funds with an equitable mechanism to compensate for damages caused by oil spills. This streamlining of the Federal process can only benefit New Jersey as well.

There is an important caveat that has already been noted this morning that we would add our support for this legislation, and that is our great concern with the issue of Federal preemption of State law. New Jersey cannot support any legislation which would preempt the ability of our State to continue to tax and to spend money through State-administrated spill fund. It is our understanding that the legislation and legislative proposals now being considered by the Senate include language that would not preempt New Jersey's spill fund.

We commend our representatives, and especially Senator Lautenberg, for taking this very appropriate action. And this is probably a good time for me to thank you, Senator, for your efforts on the Superfund side to clear up the longstanding preemption problem that makes us especially sensitive to the issue in this legislation.

In order to avoid any confusion over our position on this critical issue, we have appended some suggested language to our testimony, which was submitted.

We also understand that the latest legislative proposals include provisions for stacking of a shipowner's liability coverage with the domestic fund that is being considered and the international funds that we may become subject too. In our judgment, these are important because they provide the maximum level of compensation in the event of a catastrophic accident.

One provision of the proposed legislation which we would like to address at this time is the concept of a direct draw from the Federal fund by a State government for the purpose of an immediate oil spill response. I would like to preface anything I say about direct State response with a word of praise for the Coast Guard, for EPA Regions II and III, and especially Coast Guard District III, which have responded admirably and consistently to all of the spills in our area.

Nevertheless, I think the ability of the State to rapidly deploy cleanup equipment without having to proceed through a maze of Federal administrative steps could result in rapid containment and reduced environmental damage. We have also suggested language for this section of the law and submitted it for your consideration.

At this point, I should summarize and say that there are many other technical aspects of the law, of the proposals of H.R. 2005 and S. 2340 that we have looked at that would not be objectionable to the State.

I should also note, Senator Mitchell, we have just this morning received copies of your legislation, and we are rapidly reviewing it and expect to contact you forthwith if any problems come up.

At this point, I would be happy to try to answer any questions that you might have. I thank you again for the opportunity to be here today.

Senator STAFFORD. Thank you, Mr. Tyler.

We will go next to Mr. Clifton E. Curtis, of the Oceanic Society.

STATEMENT OF CLIFTON E. CURTIS, PRESIDENT, THE OCEANIC SOCIETY

Mr. CURTIS. Thank you, Chairman Stafford. The Oceanic Society appreciates your committee's invitation to present testimony today.

Our organization and the environmental community at large have consistently advocated and supported the establishment of a comprehensive oil spill liability and compensation regime. Substantial time and attention have been devoted to formulating effective measures, to address the continuing problem of oil spills. With the 99th Congress drawing to a close, it is our hope that remaining differences can be reconciled with legislation enacted into law this year.

Damaging oil spills continue to occur, resulting in property and environmental damage as well as personal injury and death. Moreover, the potential for a catastrophic spill remains. Under existing Federal law, at least five statutes deal with the issue of oil spill liability and compensation. Each is different, and each is inadequate. State statutes on this subject vary tremendously as to their adequacy. Given the substantial variations existing in State laws, the victims of an oil spill affecting one coastal State can fare far better or far worse than adjacent States' victims in efforts to receive adequate compensation for their losses.

In addition to national and State laws in effect, there also exists an international regime consisting of two treaties: The 1969 CLC and 1971 Fund Conventions. Over the years, the environmental community consistently has supported the Senate's decision not to agree to U.S. ratification of those treaties absent substantial revision.

In the Oceanic Society's views, three complementary components are needed to rectify the completely inadequate state of affairs that now exists. Those three components are: One, enactment of a comprehensive national law; two, U.S. ratification of the 1984 CLC/Fund protocols; and three, retention of necessary State laws and programs, including special State funds, such as those in Maine and New Jersey.

This three-part comprehensive regime offers a package approach far superior to the present situation. Each component can complement the others to assure full and fair coverage. The combination of these components provides an effective opportunity to meet the "polluter pays" principle, both in letter and in spirit, in contrast with the uncertainties and constraints imposed by the present system.

While there are several differences between S. 2340, Senator Mitchell's bill, and H.R. 5300, the most important one pertains to the question of national liability limits vis-a-vis State laws on this same subject. As a general principle, the Oceanic Society opposes limits on liability. They undermine the goal of a "polluter pays" principle, since once the limit is reached, either someone else pays or the cleanup and damage costs go uncompensated. In either case, the polluter is subsidized. The question is how best to accomplish the objective of assuring that the polluter pays. In our view, the House approach is more likely to ensure that victims of spills are

fully compensated by the spiller and those industries which engage in oil-related activities.

While the concept of retaining unlimited liability laws at the State level for those vessels covered by the protocols and national legislation may have theoretical merit, it is our belief that theory, absent adequate, effective, and timely funds, does very little to ensure full compensation for cleanup costs, for natural resource damages, or other third-party damages.

Some of the reasons, which I will summarize, are given in my prepared statement. First, the 1851 Limitation of Liability Act now limits recovery under State law, where pertinent, and has done so for the past 135 years.

Second, at the national level, liability limits and standards differ widely, depending on the type of activity or the location of the spill.

Third, residents of several coastal States have laws which establish liability limits, none of which would begin to cover the costs associated with a catastrophic spill.

Fourth, when claimants are forced to resort to litigation to recoup their losses, the barriers to success under common law are formidable.

Fifth, and perhaps most importantly, none of our national and State laws applied separately or together provides a sufficiently large source of available funds complementing spiller liabilities to deal fairly and expeditiously with claims that would be likely if a catastrophic spill were to occur.

Because of these kinds of concerns, the Oceanic Society believes that the House approach, which preempts States from retaining conflicting liability limit laws beyond State waters, is the necessary quid pro quo to achieving a comprehensive regime that will address our current needs. Most importantly, it is necessary because it sets the stage for the enactment of national legislation complemented by the international and State components, in order to provide substantial liability and available funds to efficiently and fully compensate cleanup costs and damages.

Through enactment of this comprehensive national law, the opportunity exists for the first time in our Nation's history to have in place a regime dealing with oil spills that: One, fairly assigns risk and internalizes the costs of transporting and handling oil among the spiller and the industry; two, ensures rapid repair, restoration, and rehabilitation, or replacement of damaged or destroyed natural resources; three, completely reimburses spill victims, including third-party damages, and compensates the public for loss of use and enjoyment of natural resources; and four, provides more effective incentives for preventing oil discharges.

Within U.S. waters, there have been no oil spills from either vessels or facilities for which cleanup and damage claims were anywhere close to those involving the Amoco Cadiz. From the Oceanic Society's perspective, a comprehensive regime for oil spill liability and compensation does need to be fully responsive to any spill impacting our Nation's citizens and natural resources.

Given the spill response capability that exists within the U.S. Coast Guard, in combination with other Federal agencies, industry assistance, State and local efforts, it is our view that the total costs

of any spill that might occur would be covered under the comprehensive regime we support. Even where those costs are substantial, the ready access to funds would enhance expeditious response action and claims settlement, avoiding the costs of lengthy delays that have skyrocketed the Amoco Cadiz claims and postponed cleanup activities.

Other differences exist between the Senate and House bills. On several important issues, the Oceanic Society finds the provisions contained in S. 2340 and Senator Mitchell's bill to be far superior. I have attached as appendix A to my prepared statement a list of those issues and others that we believe merit attention in formulating an effective comprehensive law.

As is well known to members of this committee, in the spring of 1984, the CLC/Fund Conventions were significantly improved at a diplomatic conference in which the U.S. delegation played a leading role. From an environmental perspective, the 1984 CLC/Fund protocols are not perfect. However, on balance, we believe that they serve as a global common denominator, which merit U.S. ratification. The Oceanic Society supports the ratification because we believe that those global agreements can assist in our efforts to assure that marine resources and other victims are protected in this country and elsewhere.

On each occasion when the Oceanic Society has presented testimony on this subject, we have noted our interest in hearing the views of State officials. State concerns, such as those of Maine, New Jersey, and Connecticut, obviously are critical to fashioning any acceptable new regime. As for liability limits, the overwhelming sentiment we have heard is that State officials are not that troubled by the prospect of preemption of their right to set separate liability limits for vessels covered under both the protocols and a comprehensive national law as long as their other State laws and programs, including special funds, are preserved.

Senator STAFFORD. Mr. Curtis, are you nearly concluded?

Mr. CURTIS. I am. I have only three or four more sentences.

Senator STAFFORD. All right.

Mr. CURTIS. Thank you. As for other issues, the Oceanic Society remains interested in supporting State concerns that would enhance the effectiveness of a comprehensive regime.

Mr. Chairman, the Oceanic Society's interest in this issue is to work with members of your committee and others to achieve essential advances in the legal, financial, and institutional framework that is needed to protect people, real and personal property, and our vital ocean and coastal resources from the inevitable occurrence of oil spills. We appreciate greatly the time and attention that you are devoting to this issue, and your leadership role on matters generally that affect the quality of our environment. With a cooperative spirit among all interested parties, we believe that comprehensive legislation can be enacted this Congress to provide the framework for full and effective protection.

I would be glad to answer any questions that you have. Thank you.

Senator STAFFORD. Thank you, indeed, Mr. Curtis. We will get to questions in just 1 minute.

Before we recognize the next witness, we note that Senator Chafee has arrived.

Senator, do you have any statement at this point?

Senator CHAFEE. I do not, Mr. Chairman. Unfortunately, I had a conflict and was not able to be here before. But I do want to thank you for holding these hearings, which are in accordance with the promise that you made in connection with the Superfund. It is a subject of great concern and interest, and even though I cannot stay the entire time, I certainly will be following these proceedings.

I want to thank you and Senator Mitchell both, you and Senator Mitchell, of course, having been deeply interested in this.

Senator STAFFORD. Thank you very much, Senator Chafee.

At this point, we will, Mr. Curtis, place your entire statement in the record.

We will now turn to Sharron Stewart, of the Gulf Coast Fishermen's Environmental Fund.

We will place your entire statement in the record, I might say, Ms. Stewart. I see it is fairly brief, so you have the option of reading it or summarizing it, whichever you wish.

STATEMENT OF SHARRON STEWART, VICE PRESIDENT, GULF COAST FISHERMEN'S ENVIRONMENTAL DEFENSE FUND

Ms. STEWART. I will try to summarize it. It's not quite that brief.

Senator STAFFORD. All right.

Ms. STEWART. Mr. Chairman, members of the committee, thank you. It is an honor to have the opportunity to testify before you today. I would like to discuss the need for this legislative action. The Federal record has been thoroughly developed ever since the 94th Congress on this issue. We are pleased to see that the 99th Congress is considering action, and it is our hope that an effective oil spill regime can be enacted into law before you adjourn.

We believe the problem must be addressed in three arenas: The international level, the national level, and by the States. For this reason, we support, with specific reservations: Ratification of the international protocols; comprehensive Federal oil pollution liability and compensation legislation; and no preemption of State oil spill cleanup programs or funds.

This position was not arrived at easily, due to our strong belief that the polluter must pay in all instances for damage done. Unfortunately, this is not the practice. Even when the polluter is identified, the damages paid do not compensate adequately for lost income, direct or indirect, and loss of natural resources. In our view, the three-fold approach mentioned above is the best and most effective way to assure that all cleanup costs and damages are fully compensated.

The 1984 CLC and fund protocols. We support the efforts that were undertaken by the United States to improve the original 1969 CLC and the 1971 fund conventions, hereafter referred to as "the protocols."

However, we do have one concern with regard to the international protocols, which relates to the negligence standard used to eliminate application of the liability limits. We feel that where negligence or misconduct are shown, the owner and/or operator should

have unlimited liability. Under the protocols, the owner may be negligent and still be able to retain the liability limitation. This issue should be better addressed by the Federal legislation.

The following points highlight some of our views with regard to the proposed Federal legislation. I have eliminated several of them that have already been mentioned, particularly by the Coastal States Organization.

The compensation funds should not be preempted, nor should there be restrictions on fund size or use. The State's authority to tax oil imports for financing the State compensation fund should be maintained. If the international protocols are ratified, with their present liability limits, a Federal compensation fund is necessary to cover damages in excess of the amount for which the owner is liable. The Federal fund should supplement the international fund to afford greater coverage, giving real effect to the so-called "stacking" or top-off concept.

All types of damages must be recoverable; specifically, natural resource damage assessment costs incurred by the State or Federal Government must remain as a compensable damage. In this regard, we support section 5(a) of S. 2340.

The term "speculative claims," referring to claims not covered by international or national legislation, must be more specifically defined. Claims for long-term resource damage (not immediately apparent or proven) should be covered by international or national legislation and must be excluded from the definition of "speculative claims."

Insurer guarantees must be available and standardized worldwide to certify that the insurer is financially able to make the payments necessary under the CLC protocol.

Hazardous substances and hazardous wastes should not be included in the definition of "oil" under international or national legislation. The liability limits, as proposed in H.R. 2005 and H.R. 5300 for inland barges and port facilities are far too low to cover potential risks. No logical reason exists for treating oil spills from barges and facilities different from oil spilled from vessels. The risks and potential damages are the same; therefore, the liability limits should be comparable.

There should be a reallocation of the U.S. Coast Guard's strike team oil spill equipment to the gulf coast. This request has been made often in the past and has been refused. The gulf coast carries the burden of offshore development for the United States, with the largest number of rigs and 8 of the top 10 ports for oil imports, based on volume, in the United States. Consequently, the exposure of our coastline to damage from oil spills is much greater than for other coasts.

It has been proposed that the States have immediate and direct access to the oilspill liability trust fund up to $50,000 for the purposes of immediate response. We believe that $250,000 would be a more appropriate ceiling for immediate drawing rights. We understand that the Federal Outer Continental Shelf only has immediate drawing rights up to $50,000. It should also be considered when the Federal Outer Continental Shelf limit be raised for the same reasons, particularly when outside contractors must be used.

In addition, we strongly believe that the language for drawing rights and contract development be clearly stated in the legislation. This would provide for greater uniformity nationwide, would ensure that the contracts are available to the States, and that they meet the intent of the legislation. The abuse of such discretion has been shown clearly under the CERCLA provisions for Federal-State cooperative agreements for removal actions. No State has currently been able to obtain such an agreement with the EPA, despite repeated requests by several States, including Texas.

The interaction between the Federal Outer Continental Shelf and the State, which may simultaneously want to draw from the fund for the same incident, needs to be clarified for the fund drawing rights. The proposed amendments for the direct-draw authority need further clarification.

The international protocols apply only when a foreign seagoing tanker is involved in an oil spill. Therefore, national legislation must cover all other sources of oil spills. This should include, but not be limited to, onshore and offshore facilities, inland barges, U.S.-flag vessels, foreign-flag ships of nonmember nations, and foreign and domestic offshore units.

The national legislation should impose liability limits to cover these other sources just mentioned, to levels that meet or exceed amounts that are comparable to those dealt with in the international protocol limits. Language should be included to adjust limits upward as changing economic conditions may require.

We suggest that for the purpose of research, and assessment of damages, that the National Oceanic and Atmospheric Administration, as a result of its "designated mission," take the lead in coordinating the work to be performed.

The national legislation should have language that clearly reflects the findings in the *MV Testbank* case, that indirect economic loss, even though forseeable, is not compensable in maritime tort except for those who sustain physical damages from a proprietary interest. In that case, fishermen who made their living from fishing in the area were compensated for the spill of pentachlorophenol. However, marina and boat rental operators, wholesale and retail food enterprises, restaurants, tackle and bait shops, and other similar establishments were held to have no claim. Had the spill occurred on land, such damages would have been compensable, provided that the spill was foreseeable.

I have summarized for you the results of three major gulf spills in my written testimony. These are, in fact, the three largest offshore spills in U.S. waters. I will be happy to respond to any questions concerning these spills.

In conclusion, Gulf Coast Fishermen's Environmental Defense Fund supports action by members of this committee and by the 99th Congress that will result in U.S. ratification of the protocols, enactment of a comprehensive Federal law, and no preemption of State oil spill cleanup programs or funds, consistent with the additional concerns addressed in our testimony. We look forward to working with you to accomplish that objective. Thank you.

Senator STAFFORD. Thank you very much, Ms. Stewart.

I think we will now go to questions, and on the first round maybe we should agree on 10 minutes apiece or on a second round, if necessary. Is that agreeable?

[No response.]

Senator STAFFORD. All right.

Mr. Curtis, in your testimony you say that President Reagan would veto a bill preserving States' rights in this area. My question is, has somebody in the administration, Secretary Dole or some official of the Coast Guard, told you that they would recommend a veto?

Mr. CURTIS. That statement is based both on informal conversations with DOT officials working on this legislation, and, more importantly, on the record of Secretary Dole's statements at House hearings and before your committee in April of this year, at which she made clear the view of the administration that the protocols were needed in tandem with national legislation.

Senator STAFFORD. All right. But she has not made such a statement directly to you then?

Mr. CURTIS. That's correct. She has not.

Senator STAFFORD. All right. Let me ask any of the witnesses who might care to comment on this one. When the *Amoco Cadiz* went down, the Governments of France and the affected communes responded immediately. The French Army and Navy as well as the British Navy were called in to help. Thousands of communal Government employees were mobilized along with private volunteers, and there was a massive cleanup and compensation effort.

It seems to this Senator that were the *Amoco Cadiz* to go down off the United States or there be a similar event, that we might do exactly the same. The National Guard, Army, Navy, and State governments would all be mobilized. We would clean first and ask questions later.

My question is, do you agree that this would be the case, and, if so, why is the Federal law necessary? Anybody care to comment on that? Yes, sir? Mr. Curtis?

Mr. CURTIS. Mr. Chairman, I think your suggested answer to that question is correct. I think there would be response. We would take the action that is needed to clean up on the short term, and stay with it as best we can over the longer term to protect our marine and coastal resources.

I think the more important question, though, beyond that, is the matter of compensation needed to reimburse victims whether it's the National Guard or the Coast Guard, State officials, private citizens, or others. The reimbursement of those efforts, including the important need for compensation of damage claims for third-party damages and other losses, is an important issue that would affect the livelihoods of many people—those who are damaged. I think it is that issue of compensation whereby, depending upon who the spiller was, you might not have access to sufficient funds to reimburse the Federal Government so that the taxpayer isn't paying for that effort, and so that the spiller and the oil industry would be responsible for damage claims.

Senator STAFFORD. Is there further comment? Mr. Rocque?

Mr. ROCQUE. Yes, Chairman Stafford. I agree with Mr. Curtis. I think one of the primary issues related to the *Amoco Cadiz* would

be the compensation levels. We're talking about a spill that may ultimately top out at around $400 million, which is certainly greatly in excess of any existing State funds. There is no question there would be a response to that type of a spill, but perhaps more important, and speaking more to the need for Federal legislation is that the kinds of spills that we expect to see, and in fact do see every day, are very small spills in relation to the type of spill that we saw from the *Amoco Cadiz*.

It is very unlikely that we will see that size spill in domestic waters or in the territorial sea. I mean, it could happen, but it's the every day spill, the small handling spills, the small barges that run aground, lose a little bit of oil, even those that capsize and most of the oil is recaptured when you're losing relatively small amounts.

Second, without domestic legislation, the cumulative impacts of these spills is totally unaddressed. I mean, that is something that can't be done at the State level very effectively and certainly can't be done where it crosses State boundaries.

Senator STAFFORD. Is there further comment? Yes, ma'am, Ms. Stewart?

Ms. STEWART. Yes, Senator, I agree with both those comments. I would also like to add that without the language in S. 2340 that provides for the development of an assessment methodology for natural resource damages, even an *Amoco Cadiz*-type spill off our country would be devastating because there is no state of the art on how to do this, and unless it's mandated by the Congress, it will never be done.

Senator STAFFORD. All right. Is there further comment?

[No response.]

Senator STAFFORD. If not, Mr. Tyler, let me address this question to you. Does the State of New Jersey agree with the position of the Coastal States Organization that a limited preemption of State law, specifically a limit on liability, is acceptable if adequate Federal, State, and international compensation schemes are in place?

Mr. TYLER. Let me preface my answer by saying that the State of New Jersey is categorically opposed to the preemption of its laws, and we are especially sore, I guess, at the preemption of our ability to tax in the hazardous waste/oil spill cleanup area.

Having said that, we recognize that a limited preemption, specifically in setting the standard of liability or the limit of liability, might be necessary to put a comprehensive package of national/international laws in place. While we would not embrace it willingly, we might swallow it as a necessary bitter pill to put a better program than we have today in place.

Senator STAFFORD. Thank you.

Mr. ROCQUE, you make a cogent case against having Federal law set limits on liability that are preemptive of State liability limits. Yet, with respect to the international protocols, you say that your member States are willing to accept preemption in the area of State liability limits. Can you explain what features of the international scheme are so attractive that they overcome States' traditionally strong opposition to preemption of State laws? Since neither S. 2340 or S. 2799 preempt States' laws, why is it desirable to exclude onshore facilities from coverage by Federal law?

Mr. ROCQUE. With your permission, Senator Stafford, I would like to push that question to my colleague, Mr. Slade, who is far more knowledgeable about the CSO survey results than I.

I would say, however, that with regard to preemption, I should clarify one aspect about the preemption issue. CSO came to an agreement that some preemption was acceptable in terms of the States' funds, rather reluctantly. As Mr. Tyler points out, New Jersey is not an enthusiastic supporter of that concept. I assure you neither is Connecticut and neither are some of the other States.

It was an agreement that was reached largely out of the realization that it was probably necessary in order to move the protocols and the domestic legislation forward. It was something that we were reluctant about.

David, would you care to respond?

Mr. SLADE. If I can address the second half, Mr. Chairman, of your question about Federal law applying to vessels and facilities outside of State territory and State law applying. If S. 2340 or the Mitchell bill were enacted into law and no State law was preempted, then that just wouldn't be of any concern really. I mean, if no State law was preempted anywhere, then that division between State territory and Federal territory is just no longer important.

Senator STAFFORD. All right. Thank you very much.

The Chair is about to recognize Senator Mitchell for questions. But before I do that, let the record show that Senator Durenberger has been here and, due to other commitments, has had to leave, and that my friend and the ranking member of the committee, Senator Bentsen, has arrived.

Senator Bentsen, do you have any statement you want to make?

Senator BENTSEN. Not at this time. Thank you, Mr. Chairman.

Senator STAFFORD. All right.

Senator BENTSEN. I have the usual problem we have, of having three committees meeting at the same time.

Senator STAFFORD. The Chair understands that, and all is forgiven if you can get Superfund's funding through the Finance Committee.

Senator BENTSEN. Is that all.

Senator STAFFORD. Senator Mitchell.

Senator MITCHELL. Thank you, Mr. Chairman.

Mr. Rocque, I would like to begin with you. I have a series of questions. In your statement, you stated, and I quote, "Without exception, all 24 States with oil spill programs support ratification of the protocols and enactment of domestic legislation," even though that would supersede State law in some respects. Maine is one of those 24 States, is it not?

Mr. ROCQUE. Yes, sir.

Senator MITCHELL. And you have just heard the attorney general of Maine state that Maine does not agree with that position.

Mr. ROCQUE. Yes, I did hear that, sir. That's why I clarified my remarks by saying that I would defer to the States that are testifying here.

I think it's very difficult to reach concensus when you have an organization the size of the Coastal States Organization, with very many different types of State laws. The delegates get together and

they thrash through this over a series of years or months or weeks, and it's very difficult to get the last, up-to-the-minute position.

I still stand by the statement, though. I think the statement is generally reflective of where the States would go, and that probably is more a reflection of the reality than it is the desire of the individual member States.

Senator MITCHELL. Well, I appreciate that. I think you made a very good statement, and it will be very helpful to the committee. I just want to make clear that I strongly disagreed with the political assessment that you and Mr. Tyler and Mr. Slade expressed that you have to accept preemption under these circumstances. I happen to feel strongly to the contrary. That is, of course, a matter of subjective judgment, and I appreciate the fact that you generally do not favor preemption.

I recognize that, since my bill was so recently introduced, you have not had the opportunity to review it carefully. There are, however, a number of areas with respect to my legislation which you comment in your statement, which I would like to clarify. I think we are probably in agreement on almost all, if not all, of the issues. But I would like just to comment on them.

You state that your understanding is that section 106 of S. 2799 provides that "State law stands to the extent that it is not inconsistent with the protocols." It is my intention in drafting the legislation, and I believe it's clear, that if you take section 106 in context with title III, it is clear my intention is that the protocols would stand only to the extent that they are not inconsistent with Federal nonpreemptive law, so that both Federal and State regimes remain in place. It's just a matter of emphasis in that.

You express a preference for inland barges to be treated as tankers due to the risks posed by barges, and Ms. Stewart made the same comment. I would refer you to section 102(c)(1), which is at page 9 of my bill, which provides expressly that. It provides a "$420 per gross ton or a $10 million limit, whichever is greater, of any tanker carrying oil in bulk or in commercial quantities as cargo, including any such barge operating in navigable waters."

Mr. ROCQUE. Yes, Senator. As a matter of fact, I did notice that. Being from Connecticut, and since many of our barges are inland barges that traverse Long Island Sound, even though they may actually be of tanker size, it's a very important issue to the State of Connecticut. I looked that up right away when I walked into the committee room this morning, and I am grateful to see that in your bill.

Senator MITCHELL. All right. Now, in your testimony, you express a preference for States to enforce Federal financial responsibility requirements across the board. I would refer you to section 106(c) of my legislation, which I believe does just that, or at least that was the intention.

Finally, I would, taking a look at the testimony on page 11, regarding the use and limits of the Federal fund, I just wanted to make clear—I am not certain it's understood, based on your statement—that my legislation provides for a $350 million Federal fund, but provides for a $500 million per-incident limit. It's my intention that if an incident exceeds the $350 million in the fund, further fees are collected to go toward the per-incident limit. In the discus-

sion of stacking in your statement, it wasn't clear to me that that was clear to you, and I just wanted to make that point.

Mr. ROCQUE. We do understand, Senator Mitchell. As a matter of fact, given what I have seen of your bill—and we will take a much more close look at it—it appears to hit the mark from the CSO perspective, if I might take that risk for my colleagues.

Senator MITCHELL. Mr. Curtis, I would like now to ask you a couple of questions. First, I commend you for the statement, a very thoughtful and, I think, very valuable statement, particularly the history and the current status of the laws and their conflicts. It makes a major contribution towards the legislation, and I think many of the points in your statement are well taken.

As I am sure you will understand, I do not agree with the position that you take on preemption.

But first, I note that you express opposition to preemption in general, and I understand that is the position of your organization. Following that up, do you agree that the nonpreemption provisions of Superfund are appropriate? That is, are you advocating repeal of the provisions of Superfund which do not preempt State law?

Mr. CURTIS. I am not.

Senator MITCHELL. All right. Are you advocating repeal of the provisions in the Clean Air Act which do not preempt State law?

Mr. CURTIS. I am not.

Senator MITCHELL. Are you advocating repeal of the provisions of the Clean Water Act which do not preempt State law?

Mr. CURTIS. Ditto.

Senator MITCHELL. And so on down the line?

Mr. CURTIS. Right.

Senator MITCHELL. So, what you came here and said is that you are opposed to preemption in general, you do not favor repeal of the provisions in all other Federal environmental laws which do not preempt State law, but in this one particular case you express a preference for preemption. In that event, it seems to me that you have a rather heavy burden in view of your position on all other laws, to make the case for preemption in this case, in this particular instance. Would you agree with that? It seems to me that if you have a general position against it, against preemption everywhere else.

Mr. CURTIS. I would agree with that.

Senator MITCHELL. Now, what you have done is you have listed five reasons for supporting U.S. ratification of the protocols, and your statement is that it is the benefits to be derived from ratification of the protocols that justifies the preemption in this instance; and that is, of course, the political judgment made by Mr. Rocque, Mr. Tyler, and others.

I would ask you, if you have had the chance to review the legislation I have recently introduced, if you would identify for me any one of those five benefits that would not be obtained if my legislation were enacted? If you have not had the chance to review the bill, would you do that in writing after you have had the opportunity to review it in some detail?

Mr. CURTIS. I would like to review it in more detail. But at the risk of not knowing it well enough, I would say that I think that your bill would address all of the concerns made in that statement

if enacted. But my concern is that I don't believe that your bill could be enacted unless there were some limited liability preemption of State law.

Senator MITCHELL. So, then, your judgment to support preemption does not deal with the substance of that issue, but it is a political judgment that legislation cannot be enacted unless it contains some limited preemption? That is what you just said, as I understood it.

Mr. CURTIS. It's a political judgment, an environmental judgment, out of concern for protection of our resources, having worked on this issue for several years, believing that in order to have the type of regime that we desperately need, that that is the quid pro quo that's required. And it's not just the protocols, but it involves national and State programs.

Senator MITCHELL. But on the substance of the issue, if my bill could be enacted, making that assumption, then all of the benefits which you've set forth there, at least to the extent that you have had a chance to review the bill, would be obtained through the enactment of such legislation. It is your political judgment that the inability to enact such legislation which leads you to the position that you are taking now?

Mr. CURTIS. That's a fair statement. That's correct.

Senator MITCHELL. Thank you, Mr. Chairman. I do have some other questions if I could have another round later.

Senator STAFFORD. Certainly. We will go for another round.

Senator MITCHELL. Thank you, gentlemen.

Senator STAFFORD. Senator Lautenberg.

Senator LAUTENBERG. Thank you, Mr. Chairman.

Following Senator Mitchell's eloquent prosecutorial style is not an easy assignment.

Anyway, I just wanted to clarify a principal issue with me, which I made obvious in my opening statement; that is that preemption language—and I, too, share Senator Mitchell's view that you are kind of damning this thing with praise; most of you are, in your testimony. I think, very frankly, that there would be an opposing point of view as to whether or not we could get this legislation through, at least start it working, with the conditions that idealize, and then chip away at a later date, instead of starting off by saying, "OK, we know we're not going to get that."

I just would like to ask, Mr. Rocque, what the consequence of not having clear nonpreemption language might be in terms of a State's capacity to respond or the advantages of a possible State unlimited liability provision loss. How do you see it affected?

Mr. ROCQUE. That's a very difficult question, obviously, Senator, to answer in the abstract, without knowing exactly what the provisions are. I think that what you would see is that States would begin to fall out, that some States would say, "No, we can't accept preemption at all," and other States would say, "We can't accept liability limits."

My sense is that if it looks like the domestic legislation is going to move forward and international protocols will be enacted that provide a better regime than currently exists, then the States will accept some limit on liability and some preemption.

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I would not presume, however, to substitute my judgment on the political question for your's or Senator Mitchell's or any of your colleagues. I mean, I would hope—and I am encouraged by Senator Mitchell's expressed interest in moving this bill, S. 2799, forward—I hope that he is successful. It is certainly in our best interests to approach it from that perspective.

Senator LAUTENBERG. Mr. Tyler, does New Jersey have unlimited liability for oil spills in any situation?

Mr. TYLER. New Jersey has a provision in its Spill Compensation and Control Act which sets an upper limit of $50 million for recovery from the fund, and then I believe that in common law, a citizen or an injured party could bring a case without any limit on liability. So we're sort of in between, because as a practical matter, I think that a person making a claim in New Jersey would rather go to the fund than seek relief, and then the fund is limited by law as to what it can recover from the responsible party.

Senator LAUTENBERG. Well, what are the other key problems posed by New Jersey, Mr. Tyler, that might occur as a result of preemption?

Mr. TYLER. Well, the main point I would like to make in response is that we are not supporting preemption. I hope I said that clearly. We would be in a lot of trouble with respect to our capacity to respond to oil spills, both in State waters, on State land, or in international or national jurisdictions, if necessary, if we could not continue to impose our oil tax and continue to operate the program without any preemption from the Federal side.

So there would be serious environmental setback to the State if the preemption provisions were enacted. The only concession I made in discussing preemption was in the very narrow area of a limit on liability, and, in effect, I will be easier than the other proponents of that limit on liability by saying that if it can be enacted, if this legislation could be enacted without that, we would be the first to stand up and say, "Hear, hear. We would love to see that happen," and offer to compromise as something we were given to understand was absolutely necessary.

Senator LAUTENBERG. Do you see a response problem with the threat of preemption? What concerns me as I listened is whether or not—and I heard everybody salute the notion that if there were enormous damage, a catastrophic kind of thing, that somehow or other we would get it done. I think, however, that there would be some either time loss or concern about how it gets paid for that might, in turn, slow the process of removal or cleanup. That could be devastating.

Mr. TYLER. You are absolutely right, Senator. The problem we face now with hazardous materials and hazardous substances is exactly that—that after the Supreme Court ruled in *Exxon* v. *Hunt* and found that the existing Superfund law does have a preemptive effect, there is an administrative maze that must be gone through before a funding decision is made. Now, we still respond to emergencies but——

Senator LAUTENBERG. When you talk about something of this magnitude, it gets tough.

Mr. TYLER. It is a distressing proposition right now, and that's why we have been waiting eagerly for the new Superfund to be enacted with the preemption provisions removed.

Senator LAUTENBERG. Mr. Rocque, Mr. Curtis presented a view on preemption contrary to the others. However, Senator Mitchell has gotten to the bottom of it with a degree of grace that all of us admire here.

Mr. Curtis, I think I saw by your various head noddings and notes of assent that you thought that preemption, as I understood you, was not a good idea—and I will put words in your mouth and just leave it at that, if you don't mind.

But I would just like to ask, Mr. Rocque, given your preference, would you like to see nonpreemption altogether?

Mr. ROCQUE. Yes, sir. The consensus opinion would be that no preemption is better than preemption. Preemption, as I mentioned in an earlier remark, is a reluctant point of agreement.

Senator LAUTENBERG. Mr. Curtis.

Mr. CURTIS. Yes, Senator, if I could just very briefly comment. In my prepared testimony and in response to Senator Mitchell's questions, it is our sentiment that no preemption is the preferred approach. I think everyone here at the table has said that.

The type of preemption that we are prepared to accept is a very limited form of preemption dealing with State liability limits with respect to the spiller. We strongly oppose any preemption of State laws that would provide for funds such as those in New Jersey and other State mechanisms that would assist in the effort to clean up spills and provide damages.

Senator LAUTENBERG. I thank you.

Mr. Tyler, you were fairly specific, I thought, in asking for nonpreemption, that concerns for our State include direct and, of course, immediate access to Federal funds for emergency spills and stacking. Am I correct?

Mr. TYLER. Yes.

Senator LAUTENBERG. Both the protocols and the Federal funds to increase the coverage for spills. Does that pretty much cover the principal parts of the agenda?

Mr. TYLER. Yes, that's correct.

Senator LAUTENBERG. Then, S. 2799 contains provisions meeting these concerns. If it does, then that successfully addresses the concerns that we have?

Mr. TYLER. Yes, it would appear to. We have only had a quick look at it so far, but it does seem to meet those concerns.

Senator LAUTENBERG. I thank you, Mr. Chairman, and I thank the witnesses for their excellent testimony and responses.

Senator STAFFORD. Thank you, Senator Lautenberg.

Senator BENTSEN. Thank you, Mr. Chairman.

When Secretary Dole was testifying, I made some points that concerned me concerning this legislation, which were not taken care of by the House and not taken care of in the international protocols. One of them is the problem of the IXTOC spillage-type accident, where we had the situation occur in Mexico, and neither the House bill nor the international treaty provides compensation for U.S. interests damaged by spills from foreign OCS operations.

I think that type of protection is absolutely crucial to the fishing and tourism interests in Texas and elsewhere in the gulf. I am delighted to see, as I understand it, that Senator Mitchell's bill addresses that particular point and whatever comes out of this final action of this committee I hope addresses that.

Sharron Stewart has brought up that point, and I am pleased that she did. She has been a witness for us at other times, and we appreciate her contribution.

There is another point that concerns me and that she has made repeatedly in the past, and that is the reallocation of the strike force by the U.S. Coast Guard Strike Force for such oil spills. That request has been made in the past, and it has been refused. I, frankly, think that refusal is unacceptable.

I think, Mr. Chairman, that we ought to take action in the committee report to call for the Coast Guard to give us an equitable distribution of that strike force so that we can handle this kind of spill developing along the gulf coast, where you have a country bordering us to the south that has an enormous amount of production in the Gulf of Mexico and that gulfstream moves right up against our coast.

So I would urge that in the committee report, that we bring attention to that and insist upon that kind of an equitable distribution of that strike force.

Senator STAFFORD. That would certainly be agreeable to me, Senator.

Senator BENTSEN. The other question we had that I had brought up to Secretary Dole is the question of the change in the current law which places liability for oil spills on the owner or the operator of the facility. Now, rather than the leaseholder, who generally has a much greater economic interest, I understand, Senator Mitchell, that that is a point, too, which you have addressed in your legislation, and I appreciate that.

I have no further comments, Mr. Chairman, unless I might get any further comment that you might have concerning that, Ms. Stewart.

Ms. STEWART. Thank you, Senator Bentsen. Obviously, I totally agree with you. Due to your concern, I believe that H.R. 5300, which has passed the House Merchant Marine Fisheries Committee, did put some language in which should cover an offshore oil spill such as IXTOC I, and I believe they did that specifically because of your concerns.

Senator BENTSEN. Thank you very much, Ms. Stewart.

Senator STAFFORD. I have one question of Mr. Curtis, and then a request of all of the witnesses, and so I will proceed.

Mr. Curtis, on several occasions you referred to liability schemes as being "unlimited." In the case of the *Amoco Cadiz,* the worst oil spill in history, liability will be determined under one of the kinds of regimes you call unlimited. Yet, there is good reason to believe that the damages in that case will likely be around $500 million, perhaps up to $1 billion, if all the private parties prevail.

If the damages of the worst spill in history are between $500 million and $1 billion, why do you say that they are unlimited? Is a spiller ever liable for more damage than he causes? If you wish,

you might respond to that in writing rather than here. That we would leave you the option.

Mr. CURTIS. I would prefer to do that.

Senator STAFFORD. All right.

Mr. CURTIS. I think the question, as framed, "unlimited," does not apply. There is an upper bound to liability. It is the amount that is required to cover compensation for cleanup and damages, and that is what is meant by "unlimited," to cover whatever those amounts may be. But I would like to respond further in writing.

Senator STAFFORD. All right. Very well.

[Mr. Curtis' written response to Senator Stafford's questions follows:]

THE OCEANIC SOCIETY

EDUCATION • RESEARCH • CONSERVATION

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6 October 1986

The Honorable Robert T. Stafford
Chairman
Committee on Environment and Public Works
U.S. Senate
Dirksen Senate Office Building -- Suite 410
Washington, D.C. 20510

Re: September 10th Oil Spill Liability Hearing

Dear Chairman Stafford:

During the course of your Committee's September 10th hearing on oil spill liability and compensation legislation, you asked me a question to which I responded, in part, by stating that I would provide a written response. Your question, and my written response, are as follows:

Question: On several occasions you referred to liability schemes as being "unlimited." In the case of the Amoco Cadiz, the worst oil spill in history, liability will be determined under one of the kinds of regimes you call "unlimited." Yet, there is good reason to believe that the damages in that case will likely be around $500 million, perhaps up to $1 billion, if all the private parties prevail. If the damages of the worst spill in history are between $500 million and $1 billion, why do you say that they are unlimited? Is a spiller ever liable for more damage than he causes? If you wish, you might respond to that in writing rather than here. We leave you that option.

Response (supplementing partial oral response given at the hearing): I agree with your statement that a spiller's liability would be no more than the cleanup costs and damages caused by the spill. In that sense, liability is limited. My use of the phrase "unlimited liability," however, addresses a different concept.

Under some international, federal and state laws, statutory provisions exist which establish limits on the spiller's liability, regardless of the costs associated with cleanup and damages. Varying limits exist, for example, in the 1969 Interna-

tional Convention on Oil Pollution Damage (CLC), the 1984 CLC Protocol, the 1851 Limitation of Liability Act, the Clean Water Act, and a few state laws (such as Florida and New Jersey). In contrast with those types of laws, there are numerous federal and state laws that contain provisions which do not establish specified limits. It is this latter category of laws that provide for "unlimited liability," in a statutory sense, and that is what I am referring to in my use of that phrase.

Respectfully,

Clifton Curtis
President

Senator STAFFORD. I am going to ask each of the witnesses who has been with us this morning, if you would review the bill that Senator Mitchell has introduced, S. 2799, and at your earliest convenience, offer us any comments you might have with respect to that piece of legislation, which now has several cosponsors, including the chairman of the committee, that will be my last request.

Senator Mitchell, the floor is yours.

Senator MITCHELL. Thank you very much, Mr. Chairman. I have one more question for Mr. Curtis, and then I would like just to ask Ms. Stewart a question.

Mr. Curtis, in your statement you express support for what you called the House approach, and specific reference is made to H.R. 5300, which is, of course, the House reconciliation bill.

Now, you may be aware that that bill contains two different provisions on preemption. One of them is the provision which originated in the Merchant Marine Committee, which preempts State liability laws but leaves in place the funds. I gather from your remarks that is what you were expressing support for, although the question I have is to clarify that.

There is also a provision which originated in the Public Works Committee, which is entirely preemptive, or at the very least more preemptive than the Merchant Marine Committee provision.

I did not understand clearly, reading your testimony, which, if any, you were expressing preference for. So my question to you now is—if you have an opinion, you may give it now; if you would like to review it further, we would be glad to receive it in writing—as to which of those preemption provisions in the House reconciliation bill would you prefer?

Mr. CURTIS. Senator, in my prepared statement I do mention H.R. 5300, title VI, and indicate that I am referring to that bill which has passed the House Merchant Marine and Fisheries Committee rather than the version of the reconciliation bill which has gone through the House Public Works Committee. It is that bill that I use as the benchmark for the House position because I think it best reflects the concerns of those who have worked on this issue the longest, from the House perspective.

Senator MITCHELL. Right. Thank you, Mr. Curtis. I appreciate that response.

Ms. Stewart, I commend you, as I did the other witnesses, for a very carefully prepared and well-thought-out, well-reasoned statement—especially since I agree with it; that makes it even more so, given the human tendency to think highly of those who share our predispositions. But I would like to ask you the question which really has been answered by the others. You say you want ratification of the international protocols, comprehensive Federal oil pollution liability and compensation legislation, no preemption of State oil spill cleanup programs or funds.

So do I. Now, the other witnesses have said that, in their political judgment, it is necessary in order to gain the first, to give on the third. They have said they think that the only way you can get

this whole thing done—the first and second, actually—is to give on preemption.

You have made a strong statement against preemption, and I will ask you the question in a form that would not have been permitted in my court; that is, in a leading fashion: You agree with me, don't you, that we can do this without preemption?

Ms. STEWART. Senator, that's a tough one. I have to say that philosophically I totally agree with you. But let me tell you a little bit about my background. As well as spending 18 years on a local, regional, and national level with the environmental community, I also spent 5 years as a commissioner of the Texas Deepwater Port Authority.

Senator MITCHELL. In which capacity you testified before this committee previously, as I recall.

Ms. STEWART. That is correct. As well as for the National Advisory Committee on Oceans and Atmosphere.

Senator MITCHELL. Yes.

Ms. STEWART. I have spent a great deal of time with the decisionmakers in the major oil companies. I live in a State that is in a severe economic depression. The rig count in the Gulf of Mexico last week was down to 600-and-something from 1,700 a year before. We are the largest transporters of oil. We import oil, and we produce offshore oil. All of these concerns are major to us. We also seem to suffer the largest impacts.

But I honestly have to say that in my political judgment, without some very limited form of preemption to give some certainty to the oil industry, we cannot pass this bill. I so strongly want this bill, want this legislation passed, that I am willing to give a little bit to get what I perceive to be in the national interest.

You may recall that in 1979 my testimony was for preemption based on the fact that we assumed that the Federal scheme for both oil spill legislation and for Superfund cleanup would be adequate. That has not been the case, and I think that may very well happen, if we pass Federal oil spill legislation with limited preemption, that it may in the future prove to have not been proper and there will be strong reason for changing that position.

But right now, I have to agree with the other witnesses politically.

Senator MITCHELL. Thank you very much.

Ms. STEWART. And I do so very reluctantly.

Senator MITCHELL. All right. If you think it's going to be tough to pass the bill without preemption, let me tell you from the other side it's going to be tough to pass one with preemption.

Ms. STEWART. I am aware of that, too.

Senator MITCHELL. Yes.

All right. Thank you all very much for providing us with a great deal of information and assistance.

Thank you, Mr. Chairman.

Senator STAFFORD. Thank you, Senator Mitchell.

Before you leave, I would say to the witnesses there may be one or two questions in writing from members who were not able to be here, if that is agreeable to you. When you get them, we would appreciate your early response.

Again, thank you all for being here.

The committee stands in recess until Friday.

[Whereupon, at 11:53 a.m., the committee was adjourned, to reconvene at 10 a.m., on Friday, September 12, 1986.]

[Statements submitted for the record and the bill, S. 2799, follow:]

September 10, 1986

Statement of James Tierney, Maine Attorney General

before the

Senate Environment and Public Works Committee

Oil Spill Hearing

September 10, 1986

Mr. Chairman, thank you for providing me with an opportunity to appear before the Environment and Public Works Committee today to discuss the position of the State of Maine on oil spill legislation. I am here as the Attorney General for the State of Maine, and on behalf of Maine's citizens.

I would first like to extend my appreciation to Senator Mitchell for his active assistance in assuring that Federal oil spill legislation reflects the interests of States such as Maine that seek retention of their own State oil spill laws. He and I have worked closely together to assure that Federal oil spill liability legislation does not preclude Maine from continuing to utilitize its own oil spill statute.

I am appearing before you today to urge you to continue your efforts to address both national and State concerns arising out of the damage - and threats of damage - that occur along our coast as a result of oil spills. As you know, the Maine Coastal Protection Fund has worked well for over fifteen years. In the past two years alone, the Department of Environmental Protection has been able to respond quickly to over one hundred spills of oil along its coast and other navigable waters of our State because of our Fund. Such a response effort by the State has minimized any environmental damage. In addition, compensation has been provided for those who have been adversely affected by oil spills. Because State law provides for strict, joint and several liability, successful remibursement actions hae recovered hundreds of thousands of dollars for use by the Fund. Your support of our continued ability to protect our environment is deeply appreciated.

As counsel for the Fund, I am deeply concerned with any provision in any bill that preempts any State authority in this area. Without very specific and clear language that provides no preemption of State authority, I can assure you from my experience that any questions will be the subject of costly and extended litigation. It has been my personal experience that those responsible for oil spills will use every conceivable legal argument to avoid their fiscal responsibility. A vaguely-worded,

partial preemption would be a "lawyer's dream" which would frustrate effective law enforement for years as major oil companies attempt to limit their obligations. This result hardly serves the interests of the citizens of our State or any other State.

My opposition to preemption of State laws includes opposition to preemption of State oil spill funds and State liability standards. I do not oppose Federal oil spill legislation that is not preemptive of State laws, but I vigorously oppose any Federal legislation that provides for such preemption.

As the members of this Committee are well aware, the House has passed legislation that would preempt States such as Maine from retaining their oil spill laws or their oil spill funds. In addition, industry representatives and the U.S. Coast Guard have stated that they support such preemption. The International Protocols that are pending before the Senate Foreign Relations Committee would also be preemptive of State laws.

I am hopeful that this Committee will continue its strong tradition of opposing preemption and report legislation that specifically provides for continuation of State oil spill liability schemes.

I would like to specifically comment on legislation that was introduced by Senator Mitchell and other members of the Committee earlier this week. The bill specifically authorizes States to continue their activities under State oil spill laws. State funds and State liability standards would remain in effect. State courts would have authority to hear cases arising under either the State or Federal scheme. These provisions are essential to the State of Maine, and I am pleased that they have been included in this bill.

The bill broadens coverage to all potential sources of oil spills under U.S. jursidiction and does not leave the gaps, such as on-shore facilities, that exist in the House bill.

The bill also provides that natural resources damages are entitled to compensation. This has been an issue of concern to Maine since the House and Coast Guard positions have been to limit the types of natural resource damages that are compensable. In Maine, many people make their living, either directly or indirectly, from the sea. An oil spill that made it impossible to catch lobsters or dig for clams would be a devastating hardship for many of our citizens. In addition, the effect of an oil spill on the tourism industry could be devastating. I strongly support provisions that provide for coverage of all natural resource damages.

Similarly, I support the provision in the bill that provides for compensation for economic damages, including lost income, lost profits, impairment of earning capacity, and tax losses. Such provisions are necessary if Federal legislation is to attempt to adequately compensate people for their damages.

The bill also contains provisions for direct access by States to the Federal fund for emergency funds up to $250,000 based only on notification to the Coast Guard within 24 hours. This is not a process by which the Coast Guard must approve expenditure of the funds but rather is an automatic right of States in the event of an oil spill. Since the Federal government routinely grants States millions of dollars to handle in other programs, the $250,000 direct draw authority appears to be a modest but reasonable amount.

The Protocols are implemented in the bill to the extent that they are not inconsistent with the Federal legislation, including the provisions prohibiting preemption of State laws. As in the case of Federal legislation, I do not oppose the Protocols per se but do oppose any scheme that preempts State statutes.

The Committee has set an ambitious schedule for reporting oil spill liability legislation. I am pleased that this issue is given such a priority by the members and stand ready to be of assistance in any way I can to assure that Federal legislation that does not preempt State authority is enacted this year.

I am not unmindful of the significant pressures being brought to bear for the passage of the international protocols and concurrent domestic legislation. As this session of Congress winds down, and increased pressures are brought to bear, additional proposals may come forward. I ask that a member of your staff contact me or Deputy Attorney General Philip Ahrens should any such language emerge. Because my Department works with these statutes on a daily basis, we should be able to give you almost immediate advice as to the implications of any proposed federal statute.

Thank you again for permitting me to offer my view on this important issue. I am happy to answer any questions members may have.

TESTIMONY OF
ARTHUR J. ROCQUE, Jr.
CHAIRMAN EMERITUS, COASTAL STATES ORGANIZATION

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
OF THE
UNITED STATES SENATE

SEPTEMBER 10, 1986

Mr. Chairman and Members of the Committee, my name is Art Rocque. I am Chairman Emeritus of the Coastal States Organization (CSO) and Director of Environmental Planning for the State of Connecticut. On behalf of CSO, a representative association for the governors of the 35 coastal states, commonwealths and territories, I appreciate the opportunity to present our views regarding oil spill liability and compensation.

Before beginning, I would like to extend our sincere gratitude to this Committee for scheduling this week's hearing on oil spill legislation. We often look to this Committee for leadership on matters of great environmental concern, and today's topic, pollution from oil spills, is no exception. We encourage you to maintain the fine work already initiated by this Committee, and carry a bill to conference, and ultimately to the President for signature. Many interest groups have come together on this issue, albeit with varying points of view. Nonetheless, a great deal of common ground exists between all interested parties. We are within striking distance of enacting, after nearly a decade, a truly comprehensive oil spill liability and compensation law. We wholeheartedly support this attempt. The time is ripe for passage of an oil spill legslation. The Coastal States have many concerns regarding oil spill liability and compensation legislation, but above all, we want to see a well-drafted oil spill bill reach the desk of the President. We look forward to working with you on this.

The danger of oil pollution resulting from accidental and unauthorized operational spills from tankers and oil facilities is a matter of continuing concern for the coastal states. Although offshore producers deserve great credit for their improved record in significantly decreasing the number and size of spills resulting from their operations, future exploration and production will be in deeper waters and harsher environments. This can only increase the chances that a major spill will again occur. Likewise, even though improved construction, accompanied with more stringent safety and operating standards have resulted in fewer spills, the problem of oil pollution still plagues us. In December, 1985, a U.S. tanker spilled about 189,000 gallons of Alaskan crude in Port Angeles Harbor, Washington, causing extensive damage to 7 million board feet of marketable lumber and killing a great amount of sea life. In September, 1985, a Panamanian tanker spilled about 425,000 gallons of crude into the Delaware River, causing extensive damage in three states. While potentially catastrophic, these large oil spills are but a few of the almost daily oil mishaps that require immediate action.

Scientific studies show that marine transportation and the offshore production of oil account for nearly 50% of the total volume of marine-related oil pollution. Unfortunately, current federal oil spill liability and compensation laws, of which there are four, represent an inadequate and fragmented approach to oil pollution cleanup, victim compensation, liability standards and defenses, and financial responsibility requirements. Our citizens and coastal resources need, and are entitled to have, a coordinated, comprehensive, intergovernmental approach to oil spill compensation, response, and abatement - an approach that effectively compensates victims for damages and other costs, expeditiously responds to spills of all magnitudes, and prevents spills from happening in the first place. This is not to say that state officials and the U.S. Coast Guard have not done an admirable job, under the current set of laws, responding to oil spills. Quite the contrary. But we do believe they could perform even better under a comprehensive oil spill regime.

The CSO urges the establishment of a comprehensive federal oil spill liability and compensation system. In addition, CSO backs the ratification of the international oil spill protocols now pending before the Senate Foreign Relations Committee, although we do so with an eye on domestic oil spill legislation that would, in part, implement the protocols. Our support for both the protocols and

domestic oil spill legislation is the result of analyzing the bills pending in Congress, reviewing the history of spills off of our states shores, the amount of damage done, and the cost of cleanup. In particular we have taken a close look at Senate bill 2340, and the bill recently introduced by Senator Mitchell. We have also researched the laws of 24 states with oil spill programs and held discussions with various state oil spill program administrators to determine the effect the protocols and domestic legislation would have on state law.

It is clear to us that ratification of the protocols would supercede state law by limiting the class of persons liable to only the owner of a tanker, the types of damages an owner would be liable for and the amount of liability. Nonetheless, without exception, all 24 states with oil spill programs support ratification of the protocols and enactment of domestic legislation. That is a strong statement. It is reflective of a changing consensus from the states being totally against state preemption of any degree to one of accepting a necessary, yet limited, degree of preemption. In order to receive the benefits of an interrelated international/ national/State oil spill liability and compensation system, it is apparent that states must accept a requisite degree of preemption of state law.

We must make it clear, however, that our support for the protocols is dependent upon strong domestic oil spill legislation that does not unnecessarily reduce other state regulatory or police power in the oil spill area. The CSO believes that if, to the greatest extent possible, State powers and authorities are preserved, an integrated international/national/State oil spill system would provide significant benefits to their citizens, resources and property.

Mr. Chairman, let me now respond to the pending legislation on a number of specific points.

Preemption of State Law

Section 7 of S. 2340 and section 106 of the Mitchell bill clearly preserve the authority of states to impose "additional liability or requirements with respect to the discharge of oil or other pollution by oil within such State." We read these sections to mean that, except for State authority that would necessarily be superceded if and when the international protocols are ratified, if enacted into law, either Senate bill would wholly preserve all State authority. CSO, of course, endorses this approach. State citizens should have the choice of proceeding against oil spillers under either state or federal law. However, we don't believe that a person initiating an action against a polluter under state law should be barred from sharing the benefits provided by the federal compensation fund. We will come back to this in more detail.

Limits of Liability

Of the 24 states with oil spill liability and compensation laws, 17 of them have unlimited liability. This is based on two widely accepted principles: that a polluter should pay in full for the costs of oil pollution damage caused by that polluter, and that a victim should be fully compensated.

CSO fails to see why any limitation of state liability is necessary, other than those instances where the protocols apply. It is argued that liability must be limited in order for the owner or operator to afford reasonably priced insurance coverage. Some arguments are so extreme as to suggest that tankship companies and offshore producers would not operate in an atmosphere of unlimited risk. But these claims are totally unfounded for two reasons. First, even with 17 States having unlimited liability, oil shipping and producing companies are not refusing to do business in these states. To those who make these arguments, we extend the challenge to show credible evidence of any shipper or producer who either avoids these 17 states with unlimited liability, or has chosen to quit the business because of it.

Second, the price of insurance premiums is determined by the financial security requirements, not the limits of liability. The cost of an insurance policy for, say, $60 million dollars, would be the same whether or not liability was limited under state law. Further, with required financial responsibility imposed it makes no difference whether the company owns one aged rust bucket tanker, or a fleet of the most modern supertankers.

We are told that even with limits on the required financial security, and with express limits in a policy, there have been cases where courts have held the insurance companies liable above and beyond the statutory and policy limits if liability is not limited. To the extent that this concern would otherwise have merit, section 104(e) of the Mitchell bill fully allays this problem. We support this section out of fairness to all parties. With this section it is clear that the cost of an insurance policy or of securing a guarantor would be the same for a company, whether liability was limited or not.

There is simply no good reason why State liability laws need to be preempted. Does every small spill need to be a federal offense? If all state oil spill liability laws are to be preempted, is there to be only federal enforcement? Will there be federal enforcement officials on every dock where oil is landed? We see no reason based in logic or experience why state liability laws need to be preempted.

Nonetheless, we understand that in order to reach international agreement on the two protocols it was necessary to provide limits on liability. Even so, the United States did not ratify the 1969 and 1971 treaties for the simple reason that the liability and compensation limits of ship owners and the fund were too low to provide adequate compensation. Only by raising the limits through the protocols does the United States now support them.

Similarly, if in the national level it is not possible to find sufficient agreement to pass domestic oil spill legislation without limiting liability, CSO would continue to withhold support unless the limits are sufficiently high to fully compensate all victims under a worst case scenario. To the greatest extent possible we must assure that limits on liability do not translate into limits on victim compensation.

How high must liability and compensation limits be in order to adequately assure full compensation? We can only try to answer this question from an historical perspective. The worst oil spill todate has been that of the Amoco Cadiz. Estimates of clean-up costs and damages -- not including prejudgment interest and inflation that, due to litigation delays, may add up to more than the original costs and damages -- range from a low of around $212 million to a high of about $440 million. Clearly this is a tremendous range in estimates, and is based on claims, not adjudicated damages. Nonetheless, looking at these estimates it is apparent that with the protocols and the House bill levels of liability and compensation, the amount would be adequate to assure full compensation to the victims. Without the protocols, however, or in a situation where the protocols don't apply, in order to adequately assure full compensation the domestic fund would need to be greater than in the House bill.

As drafted, the House bill establishes a fund of $300 million, with $200 million available per incident. CSO finds this amount inadequate. Although S. 2340 remains open on this question, the Mitchell bill establishes a fund of $350 million, with all of this amount potentially available per incident. We believe this goes further in assuring that victims will be adequately compensated.

The limits of liability as set forth in the Mitchell bill go further to assure adequate compensation. The liability levels for tankers in the Mitchell bill appear to be both adequate and reconcilable with the House bill. We do, however, recommend that the liability of inland barges receive a closer look.

Under the Mitchell bill, the liability of inland barges is $300 per gross ton, with a minimum of $500,000. Our concern is two fold. First, because inland barges operate in close proximity to shorelands, ecologically sensitive wetlands, and areas of commercial development, a spill from a barge is much more likely to cause extensive damage to natural resources and personal property than a spill out in open ocean waters. Second, inland barges often carry refined petroleum products, cargo that is within the definition of "oil" in the Mitchell bill. Refined petroleum products are usually significantly more toxic than crude. Thus the degree of damage to natural resources and sensitive ecological systems form a spill of refined products is very likely to be worse than from a spill of crude. For these reasons we believe the level of gross ton liability for inland barges should be set a level consistent with tankers, $420 per gross ton, with a minimum level of liability set at $5 million.

We also note that a significant benefit of enacting the protocols and domestic legislation would be the avoidance of the tremendous interest added to the damages due to the delays of litigation. Also, victims can go for years without getting any compensation at all if the only venue for relief is the courts, as exemplified by the Amoco Cadiz case. All of this would be avoided if the protocols and domestic legislation are enacted.

Finally, although it may be necessary to limit liability to reach agreement, CSO does not believe it is necessary to fully preempt state liability laws, but only to place the federal limit as a cap on state liability limits. In this manner state liability laws would not be fully preempted. In such a scenario, a victim proceeding under state law should, in the event a state court determined damages to be greater than the liability limits, be able to be compensated for the balance from the federal fund. This would not burden the federal fund any more than would total preemption of state law, whereupon all claimants would file against the federal fund. A citizen should have a choice of proceeding under either state or federal law. According to the extent and kind of damage, a person may wish to avail himself of state remedies. If the damage and costs are caused by a foreign vessel it may be better to proceed under federal law. Either way, the federal compensation fund should be available to the claimant in the event that the damages exceed the limits of liability.

Scope of Federal Law

S. 2340 imposes liability for oil spills from any "vessel or an onshore or offshore facility." Although it is reasonable to impose liability on all vessels due to their mobility, it is less clear why fixed facilities should be treated the same. Facilities that produce oil from state submerged lands and those which store, handle or transship oil on state land are subject to state regulation. States should have the authority to impose liability as they see fit for oil pollution arising from these facilities. Such facilities are not covered by the Protocols, and thus no reason exists to supercede or preempt state authority over those within their territory. Federal law should apply to facilities located outside, and State law should apply to facilities located inside, state territory.

The House-passed oil spill measure applies only to vessels and offshore facilities in federal waters, and pipelines that cross through state submerged lands. The administration supports this approach, as does CSO. We believe the scope of the House bill better reflects the proper division of authority over facilities in state territory and those in federal waters.

Preservation of State Funds

A state's authority to establish a compensation fund with the same, and possibly broader, purposes as the federal and international funds should be preserved. This goes beyond "grandfathering" existing funds, recognizing State authority to establish a compensation fund if it has not already done so. States should have the clear authority to finance their compensation funds by taxing oil "landings" at a rate determined by the state. The tax rate set under federal law to finance the federal compensation fund should not be a ceiling for, or otherwise limit, the rate that states set.

12 states have oil spill funds. All 12 are available for clean-up and abatement, while some are also available for third party damages, lost income and tax revenues, research and development, restoration of wildlife and natural resources, and associated administrative costs. These state funds have proven to be an effective means for responding to oil pollution.

Preemption of the state funds would compromise a state's ability to prevent or limit oil spill damage to the natural resources and property of its citizens. Unfortunately, situations have arisen in the past where federal clean up efforts have been inadequate. Preemption of state funds would make the states wholly dependent on the federal funds and response system. The result may be a decrease in the degree of protection from oil spill damage, rather than an improvement.

The argument that financing state funds with a tax on oil "landings" constitutes a double tax is a limited one. All state funds financed by an oil tax have statutory limits. Once a limit is reached the collection of the tax stops. Further, most states with tax financed funds require response costs to be collected first from the polluter and then from the existing or proposed federal oil spill clean up funds. Thus, state funds are reserved for cases where the private or federal responses are inadequate. There is no compelling reason why this effective backup capability to protect state citizens should be preempted by federal law.

State Court Jurisdiction

Damage from oil spills most often occurs within state waters, affecting that state's citizens, property, resources and economy. For this reason it is logical that state courts should be recognized as competent to make the original determination of the amount of damage, to whom, and when an owner or operator has a defense to the strict liability.

S.2340 and the Mitchell bill provide that a victim must first present his claim for damages to the "owner, operator or guarantor." If the claim is not satisfactorily paid, the victim then must elect whether to "commence an action in court" or present the claim to the domestic fund. CSO supports section 105(c) of the Mitchell bill that provides that a victim may file an action against the responsible party in state court or in federal court.

Under the protocols, a judgment against a foreign shipowner rendered in a "Court or other competent authority" will be recognized in the courts of other countries that are party to the international oil spill treaty. Because the domestic oil spill legislation will implement the Protocols if and when they are ratified, CSO believes, for the reasons above, that it should be expressly set out that State courts are competent to hear cases arising under the Protocols. This is also included in section 105(c) of the Mitchell bill.

State Access to National Compensation Fund

In order to assure a quick response to an oil spill, States should have immediate access to the domestic compensation fund to initiate expeditious clean up and abatement. State officials, equipment and personnel are usually located more closely than their federal counterparts to ports, harbors and the localities where oil spills are likely to occur. By granting direct draw authority to state officials of at least $250,000 without prior consent from federal fund officials, as

set forth in section 103(d) of the Mitchell bill, the great majority of spills, many of which are almost routine in nature, would not require any federal involvement at all. Further, a direct draw system would grant time to assess the full threat of the spill. If it appeared to be catastrophic in nature, the federal response teams could be mobilizing on a large scale while the state response teams were already at the scene taking preliminary abatement actions.

Because the state teams could handle the majority of the spills, federal expenditures would be reduced, while allowing the well established state oil spill response programs to continue. We urge this Committee to consider this innovative way to provide the fastest response to an oil spill while keeping federal expenses to a minimum.

Use of the Federal Liability Fund

The payment of cleanup and abatement costs, restoration of wildlife and natural resources, and administrative costs, all included in the House Bill, are proper items for the fund to cover. But CSO urges this Committee to enable the fund to cover damages to State and local governments, and third parties (including injury to, destruction of, or loss of use of real or personal property), damage and loss of natural resources (including subsisten use of natural resources and natural resources which cannot be restored), loss of profits or impairment of earning capacity, and loss of tax revenue. Both S. 2340 and the Mitchell bill are more satisfactory in this regard than the limited use of the fund as set out in the House bill.

Although CSO urges a broad use of the federal liability fund, we also strongly urge that strict standards of proof be adopted so that damages can be realistically assessed. Speculative claims, regardless of what category of damage or loss they fall under, must be avoided.

Relationship of International, National and State funds

The international, domestic and state compensation funds should be related in such a manner as to assure, to the greatest extent possible under a limited liability regime, that all damaged parties would be fully compensated. For example, in a case where the protocols apply, the full amount of damages of all parties would be compensated first from the shipowner, then the international fund, then the domestic fund, and finally from the state funds. Thus, up to $570 million would be available (once the international fund reaches the $200 million level and if the domestic fund is established as in the Mitchell bill) to compensate for oil pollution damage, in addition to compensation available in state compensation funds. This level of compensation is high enough to cover the worst catastrophic spill that has happened so far.

In the event the protocols do not apply, the national fund should be available to victims proceeding under state law once the liability limits have been reached. Under the House bill, however, only $260 million would be available to compensate for oil pollution damage, in addition to compensation available in state compensation funds. This is not enough to adequately assure full compensation. The Mitchell bill, however, provides for a domestic fund of $350 million, with the full fund amount available per incident. This provides greater assurance that a victim will be fully compensated in the event of a catastrophic oil spill.

"Stacking" of the compensation funds in this manner would create a truly coordinated and comprehensive intergovernmental oil spill system that would provide the best chance for all damaged parties to be fully compensated.

State Clean-up Consultation Rights

Both state and federal officials should agree on when the oil spill has been cleaned up as much as possible within reasonable economic bounds. The track record of state and federal officials agreeing on when 'clean is clean' is an excellent one. Nonetheless, it is prudent to formalize the process of determining when further clean up efforts would be futile or unreasonably expensive. Standards for when 'clean is clean' would facilitate deciding when to halt the clean up effort.

To many states their beaches, shorelines and coastal waters are their crown jewels, and they should have equal say when the clean up effort should be called off. For these reasons we support section 106(d) of the Mitchell bill.

State Financial Responsibility Requirements

State officials should be authorized to require proof of financial responsibility of ship owners and operators. A certificate of financial responsibility that meets the federal requirements would satisfy this. Authorizing state officials to require proof of financial responsibility would aid in the enforcement of this federal requirement.

Section 106(c) of the Mitchell bill provides that states are authorized to enforce the federal financial responsibility requirements "on the navigable waters of such State." We believe, however, that this authority should be broadened so that states can enforce these requirements anywhere within such states' territory. States would then be authorized to enforce these requirements for vessels, facilities in state waters and onshore facilities.

Express repeal of the 1851 Limitation of Liability Act

In order to avoid the possibility of litigation over this point, it should be express that the 1851 Limitation of Liability Act does not apply in cases involving vessels and facilities covered by state or federal oil spill liability and compensation laws.

Prevention of Oil Spills

Not only is there a great need to provide a comprehensive system for responding to oil spills, but the authority and appropriate funding should be clear to respond to a threat of an oil spill. An owner or operator should be liable for the costs of responding to such an emergency. Also, the domestic fund should be available to pay the costs associated with alleviating such a threat, with subrogation of rights

against the responsible party to reimburse the fund for these costs. S. 2340 does not reflect the necessity of responding to a threat of an oil spill, but the Mitchell bill does. We fully support this aspect of the Mitchell bill.

Closing Remarks

Mr. Chairman, in conclusion, as I have noted, the Coastal States have many concerns regarding oil spill legislation, but above all, our goal is to see a well-drafted bill reach the desk of the President. We are within striking distance of enacting a truly comprehensive oil spill liability and compensation law. There are many parties interested in this legislation, and a good deal of common ground exists. The Coastal States Organization remains open to discuss this matter with all interested parties. We look forward to working with this Committee in any way in order to accomplish the goal.

This concludes my remarks. I would be happy to answer any questions you or any member of this committee may have. Thank you.

STATEMENT OF MR. GEORGE TYLER
SPECIAL ASSISTANT TO THE COMMISSIONER
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
BEFORE THE
SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE
SEPTEMBER 10, 1986

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, I AM PLEASED TO OFFER TESTIMONY TODAY ON BEHALF OF COMMISSIONER RICHARD DEWLING OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION. THE STATE OF NEW JERSEY HAS BEEN FOLLOWING WITH INTEREST THE LEGISLATIVE PROPOSALS IN THE HOUSE OF REPRESENTATIVES AND IN THE SENATE WHICH WOULD PROVIDE A COMPREHENSIVE FRAMEWORK FOR OIL SPILL LIABILITY AND COMPENSATION. NEW JERSEY AS A COASTAL STATE SHOULD BENEFIT GREATLY FROM THE PASSAGE OF COMPREHENSIVE OIL SPILL LIABILITY AND COMPENSATION LEGISLATION. ON THE FEDERAL LEVEL, COMPREHENSIVE LEGISLATION WOULD REPLACE A PATCHWORK SYSTEM OF EXISTING SPILL FUNDS WITH AN EQUITABLE MECHANISM TO COMPENSATE FOR DAMAGES CAUSED BY OIL SPILLS.

WE ALSO UNDERSTAND THAT THE SENATE WILL BE CONSIDERING THE RATIFICATION OF TWO INTERNATIONAL PROTOCOLS ON OIL SPILL LIABILITY AND COMPENSATION. IT IS OUR UNDERSTANDING THAT APPROVAL OF THE PROTOCOLS WILL ALSO ENHANCE THE POSITION OF THE UNITED STATES BY BECOMING A SIGNATORY PARTY TO THE INTERNATIONAL CONVENTIONS ON OIL SPILL LIABILITY AND COMPENSATION, THUS REQUIRING EXPANDED COVERAGE ON ALL VESSELS ENTERING THE U.S. WATERS.

IT IS THE POSITION OF THE STATE OF NEW JERSEY THAT WE SUPPORT BOTH THE PASSAGE OF THE DOMESTIC LEGISLATION AND THE INTERNATIONAL PROTOCOLS.

THERE IS AN IMPORTANT CAVEAT TO OUR SUPPORT FOR THESE PROPOSALS. OVER THE PAST SEVERAL MONTHS WE HAVE COMMUNICATED TO FEDERAL OFFICIALS OUR CONCERN REGARDING ONE PROVISION IN TITLE IV OF HR 2005. NEW JERSEY CANNOT SUPPORT ANY LEGISLATION WHICH WOULD PREEMPT THE ABILITY OF THE STATE TO CONTINUE TO TAX AND SPEND MONEY THROUGH A STATE-ADMINISTERED SPILL FUND. IT IS OUR UNDERSTANDING THAT THE LEGISLATIVE PROPOSALS NOW BEING CONSIDERED BY THE HOUSE OF REPRESENTATIVES AND THE SENATE INCLUDE LANGUAGE THAT WOULD NOT PREEMPT THE STATE'S SPILL FUND. WE COMMEND OUR REPRESENTATIVES FOR TAKING THIS APPROPRIATE ACTION. IN ORDER TO AVOID ANY CONFUSION OVER THIS MOST CRITICAL ISSUE WE HAVE APPENDED OUR SUGGESTED LANGUAGE TO THIS TESTIMONY (SEE ATTACHMENT I).

WE FURTHER UNDERSTAND THAT THE LATEST LEGISLATIVE PROPOSALS INCLUDE PROVISIONS FOR STACKING OF A SHIP OWNER'S LIABILITY WITH THE DOMESTIC FUND AND THE INTERNATIONAL FUND TO PROVIDE FOR MAXIMUM PROTECTION. IN OUR JUDGEMENT THIS PROVISION IS IMPORTANT BECAUSE IT PROVIDES THE MAXIMUM LEVEL OF COMPENSATION IN THE EVENT OF A CATASTROPHIC ACCIDENT.

ONE PROVISION OF THE PROPOSED LEGISLATION WHICH WE WOULD LIKE TO ADDRESS AT THIS TIME IS THE CONCEPT OF A "DIRECT DRAW" FROM THE FEDERAL FUND BY A STATE GOVERNMENT FOR THE PURPOSE OF IMMEDIATE OIL SPILL RESPONSE. WE MUST PREFACE THESE REMARKS WITH A WORK OF PRAISE FOR THE THIRD DISTRICT OF THE UNITED STATES COAST GUARD WHO CONSISTENTLY AND ADMIRABLY RESPOND TO OIL SPILLS IN THE NEW JERSEY AREA. NEVERTHLESS THE ABILITY OF A STATE TO RAPIDLY DEPLOY CLEAN-UP EQUIPMENT WITHOUT HAVING TO PROCEED THROUGH A MAZE OF ADMINISTRATIVE STEPS COULD RESULT IN RAPID CONTAINMENT AND REDUCED ENVIRONMENTAL DAMAGES. WE HAVE ALSO SUGGESTED LANGUAGE FOR THIS SECTION OF THE LAW. IT IS ALSO ATTACHED.

THERE ARE MANY OTHER TECHNICAL PROVISIONS WITHIN THE OIL SPILL LEGISLATION THAT AFFECT THE MECHANISMS OF GOVERN-MENT AT THE FEDERAL LEVEL. WITHOUT GOING INTO DETAIL, OUR REVIEW OF THE BILLS NOW UNDER CONSIDERATION, BOTH TITLE IV OF HR 2005 AND S-2340 CONTAIN NO PROVISIONS WHICH WOULD BE OBJECTIONABLE TO THE STATE OF NEW JERSEY. I MUST NOTE THAT WE HAVE ONLY THIS MORNING READ COPIES OF THE OIL SPILL LEGISLATION TO BE INTRODUCED BY SENATOR MITCHELL. WE WILL BE REVIEWING IT IMMEDIATELY AND YOU CAN EXPECT TO HEAR FROM US FORTHWITH IF PROBLEMS HAVE ARISEN WITH ANY OF ITS PROVISIONS.

I WOULD BE PLEASED TO ANSWER ANY QUESTIONS THAT YOU MAY HAVE AT THIS TIME.

Attachment I

Nonpreemption of State Funds,
Proposed Amendment to H.R. 2005

Section 410. Relationship to Other Law
- in subsection (a)
- delete paragraph (2)
- renumber paragraph (3) and paragraph (2)

(a) Preemption - Except as provided in this title, or in section 9507 of the Internal Revenue Code of 1954 -

(1) no action may be brought in any court of the United States, or any State or political subdivision thereof, for an economic loss compensable under this subtitle, and

(2) no person may be required to establish or maintain evidence of financial responsibility relating to the satisfaction of a claim compensable under this subtitle.

- replace the existing subsection (b) with the following:

(b) Nothing in this Act or in section 9507 of the Internal Revenue Act of 1954 shall in any way affect, or be construed to affect, the authority of any State:

(1) to establish, or to continue in effect, a fund any purpose of which is to pay for costs or damages arising out of, or directly resulting from oil pollution or the substantial threat of oil pollution, or

(2) to require any person to contribute to such a fund.

(c) Actions By Trust Fund - Nothing in subsection (a) shall prohibit an action by the Trust Fund under any other provision of law to recover compensation paid under this subtitle.

Direct Draw Authority
Proposed Amendments to H.R. 2005

(Subsection 532(a) - adding a new section 9507 the Internal Revenue Code of 1954) - insert a new section 9507 (c) (1) (A) (vii) and replace section 9507 (c) (1) (B) (i)

Sec. 9507 Oil Spill Liability Trust Fund

(c) Expenditures

(1) General Expenditure Purposes

(A) In General - Amounts in the Oil Spill Liability Trust Fund shall be available, as provided in appropriation Acts, only for purposes of making expenditures for -

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(vii) the payment of costs incurred by any state in responding to the discharge, or the substantial threat of a discharge, of oil (as the term "oil" is defined in section 401 (15) of the Comprehensive Oil Pollution Liability and Compensation Act) into the navigable waters from a vessel, an onshore facility, or an offshore facility (as the terms "vessel", "onshore facility", and "offshore facility" are defined in subsection 311 (a) of the Federal Water Pollution Control Act and as the term "navigable waters" is defined in section 502(7) of the Federal Water Pollution Control Act).

(B) Special Rules.

(i) State Response Costs. The Secretary of Transportation (shall) (may) enter into agreements with the Governors of interested States to provide for the payment of response costs under subparagraph (A) (vii) of this paragraph. Each agreement shall authorize officials of the State, designated by the Governor for this purpose, to commit sums, not to exceed $50,000 per incident, for the purpose of immediate response, subject only to the requirements that the Trust Fund be notified within 24 hours of the commitment of any sums. Each agreement shall also contain a procedure by which the designated officials of the State may commit additional sums, for response to a particular incident, subject to such terms and conditions as are agreed upon. Payments under subparagraph (A) (vii) of this paragraph shall be made only in accordance with agreements adopted under this subparagraph.

THE OCEANIC SOCIETY

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10 September 1986

Statement of Clifton E. Curtis
on behalf of The Oceanic Society
before the
Senate Committee on Environment and Public Works
Concerning
Oil Pollution Liability and Compensation

I am Clifton Curtis, President of the Oceanic Society, a 40,000 member national non-profit environmental organization dedicated to the protection, conservation and wise use of ocean and coastal resources. I appreciate your Committee's invitation to present testimony today.

The Oceanic Society, and the environmental community at large, have consistently advocated and supported the establishment of a comprehensive oil spill liability and compensation regime. What our nation needs, and does not have, is a package of complementary international, national and state laws that will adequately compensate victims of oil spills, provide quick, efficient cleanup, and internalize those costs within the oil industry and its transportation sector.

Instead, we have a fragmented hodge podge of national and state laws providing inadequate cleanup and damage remedies, taxpayer subsidies to cover cleanup costs, third party damages that go uncompensated, corporate structures designed to limit exposure, and substantial barriers to victim recoveries -- such as legal defenses, statutes of limitation, and burdens of proof that favor those responsible for the spill.

Substantial time and attention have been devoted to formulating effective statutory measures to address the continuing problem of oil spill liability and compensation. These hearings provide a timely opportunity to further refine the needed elements of a comprehensive regime. Agreement among all interested parties exists on many of the elements that should comprise such a regime. With the 99th Congress drawing to a close, it is the Oceanic Society's hope that remaining differences can be reconciled, with legislation enacted into law this year.

The Nature of the Problem

Damaging oil spills continue to occur, resulting in property and environmental damage as well as personal injury and death. The amount of oil released in accidental tanker spills has declined since the latter half of the 1970s, largely due to better regulation and the decline in international oil transport. But spills continue to occur, and the potential for a catastrophic spill remains.

Recent vessel spills highlight the problem. Last December, the United States tanker Argo Anchorage ran aground in Port Angeles Harbor, Washington, resulting in the discharge of almost 200,000 gallons of crude oil. In September 1985, the Panamanian tanker, Grand Eagle, grounded in the Delaware River, damaging shorelines in Delaware, New Jersey and Pennsylvania with the estimated 425,000 gallons of crude oil that was spilled. In October, 1984, the oil tanker Puerto Rican suffered explosions just off the California coast near San Francisco. It sank and released about 400,000 gallons of oil. And in June, 1984, the M.V. Alvenus, a British tanker, grounded and fractured just off the Texas-Louisiana coast, releasing about 2 million gallons of oil. During the past two years these spills have caused serious damage to our coastal shorelines, critical habitats, and marine resources, including seabirds, fish and other species, as well as lost income and revenues.

These types of spills will continue to occur. Less likely, but also possible, is a catastrophic spill along our coast comparable to that which occurred when the Amoco Cadiz broke apart off the Brittany coast of France in 1978.

While U.S. offshore oil and gas producers deserve praise for their safety record, more stringent measures addressing these activities will be needed soon. As exploration and development shift from more tranquil nearshore areas to deepwater and frontier areas with some extreme environmental conditions, it is essential that we have a more effective law in place.

A. National Law

Under existing national law, at least five statutes deal with the issue of oil spill liability and compensation. Each is different, and each is inadequate.

The Clean Water Act (CWA), 33 U.S.C. Sec. 1251 et seq., which has jurisdiction over most large tanker and inland barge incidents, has historically not provided the kind of protection it should. The Act sets inappropriately low limits of liability for owners and operators of vessels with respect to federal oil

spill removal costs and natural damages, and provides no coverage or compensation for other damages.

As documented in a report prepared by the U.S. General Accounting Office in 1983,[1] gross inadequacies exist in the CWA's provisions dealing with spiller responsibility for cleanup costs. Between 1971 and 1982 the U.S. government obligated $124 million from the CWA's Section 311(k) revolving fund, but recovered only $49 million from spillers, for a total expenditure of $75 million in national funds. In individual cases the percentage of cleanup costs expended by the government which have been recovered in courts has been even lower.[2] National funds also are expended in the costly, time consuming litigation required to recoup cleanup expenditures. According to the GAO report, as of 1982 there were 77 cases in litigation involving U.S. government efforts to recover $36.5 million.

Another problem with the CWA is that its 311(k) revolving fund is inadequate to cover large oil spills. It has never been funded at the authorized level of $35 million, leaving aside the fact that this amount is far too low. Moreover, since the fund is appropriated from the Treasury, it undercuts budget reduction goals and runs counter to cost internalization policies. These policies are exacerbated by the fact that most courts have found the CWA to provide the only national remedy for recovering oil spill cleanup costs.[3] These courts have held that the government cannot use common law maritime tort or nuisance theories to recover its excess cleanup costs.

In addition to the CWA, the Outer Continental Shelf Lands Act Amendments (OCSLAA), 43 U.S.C. Sec. 1801 et seq., the Deep Water Ports Act (DWPA), 33 U.S.C. Sec. 1501 et seq., and the Trans-Alaska Pipeline Authorization Act (TAPAA), 43 U.S.C. Sec. 1651 et seq., all play a role in regulating oil spill liability and compensation. But they provide varying and uneven liability

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1. "International Oil Pollution: Current and Alternative Liability and Compensation Arrangements Affecting the United States," U.S. General Accounting Office, Washington, D.C., February 3, 1983.

2. For example, of the $9.6 million that the Federal government spent to clean up the 1976 Nepco Barge incident, only $875,000 (or 9%) of total cleanup costs was held to be the legal liability of the owners. In Re Oswego Barge, 439 F. Supp. 342 (D.C.N.Y. 1977).

3. See, e.g., U.S. v. Dixies Carriers, Inc., 627 F.2d 736 (5th Cir. 1980).

standards and scope of coverage for cleanup costs and damages associated with activities covered by each individual law. Moreover, this array of narrowly defined programs can create administrative problems as well. As a result, the goal of compensating those injured may be complicated by questions of regulatory jurisdiction of the various federal agencies. For example, when an oil spill occurs it would be necessary to track down the source of the spill before the applicable statute is applied and compensation claims presented.

Finally, the 1851 Limitation of Liability Act, 46 U.S.C. Sec. 181 et seq., represents a potentially devastating bar to effective recovery of either cleanup costs or damages. Perhaps that Act had merit 135 years ago, since its purpose was to further the interests of this country's budding merchant marine by encouraging shipbuilding and employment of ships. To that end, however, vessel owner liability was limited to "the amount or value of the interest of such owner in such vessel, and her freight then pending" (Sec. 183(a)). But current application of that law has result in situations where the owner pays next to nothing because the vessel and cargo are a total loss following a catastrophic incident. In two federal cases where the owner of a vessel has invoked the provisions of this Act, the courts have held that this law, where applicable, has the effect of limiting recoveries under state law, including unlimited liability law provisions.[4]

B. State Law

State statutes on the subject of oil spill liability and compensation vary tremendously as to their adequacy. In 1985 the Oceanic Society undertook a contract for the U.S. Coast Guard in which we examined state laws that address this issue.[5] The study provided an overview of 24 state oil spill liability and compen-

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4. See, e.g., Complaint of Harbor Towing Corp. 335 F. Supp. 1150 (D.C. Md. 1971); and In Re Oswego Barge Corp., supra.

5. "Oil Spill Liability and Compensation Legislative Preemption Considerations," prepared by the Oceanic Society for the U.S. Coast Guard, March 1, 1985 (as published in the congressional hearing report: Oil Pollution Liability, Hearing before the Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries, 99th Congress, 1st Sess., March 27, 1985, Serial No. 99-2, at 173-288). (With respect to the one-page table in the study (at 233) comparing key provisions of the 24 state laws, the Coastal States Organization has prepared a more recent summary comparison of those same state laws that highlights other pertinent information.)

sation laws, and a digest of statements made by various interested parties since 1975 on the question of state law preemption.

Of the 24 state statutes examined in our study, there exists substantial variations from state to state with respect to such critical matters as: who is liable; standards of liability; defenses to liability; financial responsibility requirements; cleanup costs; damages; and penalties. In 17 states, the laws provide for unlimited liability, while the other 7 set tonnage-based or overall limits (varying from $5 million to $50 million). Eleven of the 24 state laws have established special funds, which cover various costs and damages incurred as a result of a spill, and which are financed from industry assessments, the general treasury, taxes or reimbursements from spillers. Of those state laws that provide funds, 6 place a ceiling on the amount they may accumulate (varying from $1 million to $50 million). In practice, the amount actually available is often substantially less. Of those states not maintaining special funds, some laws provide for financial support from the general treasury or other sources.

Given the substantial variations existing in state laws on this subject, the victims of an oil spill affecting one coastal state can fare far better, or worse, than adjacent states' victims in their efforts to receive adequate compensation for their losses. If, for example, a major oil spill occurred in U.S. waters in the Gulf, residents of Florida and Texas would have to deal with state laws containing liability limits and more stringent defenses to liability, while having the benefit of special funds -- up to $34 million in Florida. In contrast, the residents of Alabama, Louisiana and Mississippi could avail themselves of their states' theoretical unlimited liability law provisions and less stringent defenses to liability. However, those states have no special funds available to provide expeditious compensation where the spiller does not do so, whatever the reason. Similar examples of substantial state law variations exist for adjacent coastal states along our east and west coasts.

C. Common Law

Underlying our national and state laws is a diverse body of common law -- court-made law stemming from the holdings of individual cases, rather than the mandate of statutes. Where statutory remedies are inadequate, victims of oil spills are left with the recourse of common law remedies. As a general statement, the Oceanic Society believes that common law remedies are ill-equipped to meet claims for cleanup costs and damages. We agree with the GAO report's characterization of the prospects for

a damage claimant recovering from a spiller based on common law as "likely to be minimal."[6]

Numerous problems exist under common law. Since it evolves very slowly, the common law system is not yet sufficiently advanced to deal well with the complicated aspects of releases of hazardous substances in today's world. Victims with either property damage or personal injury claims caused by oil pollution must still meet tough statute of limitation requirements and prove proximate cause and cause in fact. The burden of proving causation, even under strict liability, is particularly onerous in suits for damages caused by oil pollution because the scientific state of the art is often inadequate to link damages claimed with the spill at issue. This burden of proof may be sufficiently onerous as to make it difficult for a plaintiff to find legal representation. In addition, since each state and the federal government has its own body of common law, the degree of variations makes it difficult to assess a victim's overall chances for successfully recovery of claims.

In general, litigation barriers can be overwhelming in environmental and economic damage suits. The history of litigation arising out of the Amoco Cadiz spill is instructive of the complex process that unfolds when claims for a catastrophic spill are litigated in our courts. Although that spill occurred in 1978, it took until 1984 for the U.S. District Court in Chicago to determine who was liable. Discovery proceedings surrounding claims then became the major focus, and it was only in April, 1986, that the "phase two" trial began in order to decide who should be paid how much for what. Scores of lawyers have been involved in the litigation, and whatever result is reached in the Chicago court is certain to be challenged through higher court appeals. Meanwhile, the meter keeps running and the clock keeps ticking, and coastal contamination remains on the beaches of Brittany because funds are unavailable for restoration work.

D. International Law

In addition to national and state laws presently in effect, there also exists an international regime which has been developed under the auspices of the International Maritime Organization (IMO). Two treaties, the International Convention on Oil Pollution Damage, 1969 (CLC) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (Fund) were agreed to in the aftermath of the 1967 Torrey Canyon spill off England's southwest coast.

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6. GAO Report, supra, at 14.

Those two conventions sought to establish a uniform international oil spill liability and compensation system. The CLC established shipowner liability to persons, including governments, for oil pollution damages and cleanup costs to specific limitations. The Fund established an international fund administered by the parties that is supported by contributions calculated on the basis of the number of barrels of seaborne oil received in party states. It also provides for compensation beyond that provided by the shipowner under CLC. The CLC came into force in 1975; and the Fund in 1978.

The United States has never agreed to accept these Conventions, despite efforts towards that end during the Nixon and Ford Administrations. Inadequate liability and compensation limits, including their preemptive effect on national and state law, historically have been the reason underlying the Senate's refusal to give its advice and consent. The environmental community strongly supported the Senate's decision not to agree to such ratification, absent substantial revision of those regimes (as discussed below).

Establishing a Comprehensive Regime

With this background concerning the inadequate existing state of affairs, Mr. Chairman, I would like to address the question of what is needed. As I indicated at the outset, the Oceanic Society supports the establishment of a comprehensive oil spill liability and compensation regime.

In our view, three complementary components are needed: enactment of a comprehensive national law; U.S. ratification of the 1984 CLC/Fund Protocols; and retention of necessary state laws and programs. This comprehensive regime offers a package approach far superior to the present situation. Each component can complement the others to ensure full and fair coverage. The combination of these components provides an effective opportunity to meet the "polluter pays" principle -- both in letter and in spirit -- in contrast with the uncertainties and constraints imposed by the present system.

A. Comprehensive National Law

The Oceanic Society has presented its views on pending Congressional proposals dealing with oil spill liability and compensation on numerous occasions past. We have witnessed substantial progress in reconciling differences as these proposals have evolved, with most of the activity occurring in the context of the various House bills that have been introduced and debated.

At present, the House proposal which we believe best reflects their Members' views is contained in Title VI of H.R. 5300 -- a reconciliation bill adopted this Summer by the House Merchant Marine and Fisheries Committee that makes some noteworthy changes in the earlier House-passed bill (H.R. 2005, Title IV). Your bill, Mr. Chairman, S. 2340, provides a point of departure for various concerns that your Committee has addressed at hearings this past April, and in prior Congresses. In addition, we look forward to examining in detail the bill which Senator Mitchell is offering on this same subject.

1. Liability Limits

While there are several differences between S. 2340 and H.R. 5300, the most important one pertains to the question of liability limits. Both versions hold spillers jointly, severally and strictly liable, which the Oceanic Society supports. The House bill, however, sets dollar limits on the spiller's liability, absent certain types of negligent behavior that would result in unlimited liability, and it preempts states from imposing additional requirements beyond state waters. In contrast, while S. 2340 also contains the liability limit concept at the national level with respect to damage claims, Sec. 7 of that bill expressly notes that states are free to impose additional liability.

As a general principle, the Oceanic Society opposes limits on liability. They undermine the goal of a polluter pays principle since once the limit is reached, either someone else pays or the cleanup and damage costs go uncompensated. In either case, the polluter is subsidized. The question is how best to accomplish the objective of ensuring that the polluter pays. In our view the House approach is far more likely to ensure that victims of spills are fully compensated -- by the spiller and those industries which engage in oil-related activities.

While the concept of retaining unlimited liability laws at the state level may have theoretical merit, it is our belief that theory, absent adequate, effective and timely payment of monies, does very little to ensure full compensation for cleanup costs, natural resource damages or other third party damages. First, as noted earlier the 1851 Limitation of Liability Act now preempts state law, where pertinent, and has done so for the past 135 years. Should a spiller be able to avoid paying any cleanup costs or damages when the vessel and/or cargo are declared a total loss? Second, at the national level, liability limits and standards differ widely depending on the type of activity or the location of the spill. Should we continue to apply significantly different requirements for oil spills linked to Alaskan trade, for example, versus deep water port activities off Louisiana or other vessel and oil rig-related spills?

Third, as discussed earlier residents of 6 coastal states have laws which establish liability limits, none of which would begin to cover the costs associated with a catastrophic spill. Should those citizens, and state trustees for our natural resources, be prejudiced because of those state laws? In a related vein, is it fair for citizens of those states that have not established special funds not to have the prospect of more expeditious claims settlements, assuming adequate funds are available? Fourth, when claimants are forced to resort to litigation to recoup their losses, the barriers to successful claims under common law are formidable. Is it fair to subject claimants to these kinds of hurdles? And finally, none of our national and state laws, applied separately or together, provides a sufficiently large source of available funds (complementing spiller liabilities) to deal expeditiously with the claims that would be likely if a catastrophic spill were to occur. Would it not be far better to have one comprehensive regime?

Because of these kinds of concerns, the Oceanic Society believes that the House approach, which preempts states from retaining conflicting liability limit laws beyond state waters, is the necessary quid pro quo to achieving a comprehensive regime that will address our current needs. It is necessary because our reading of other interested parties' positions indicates that industry can block legislation that retains unlimited state liability laws for vessels covered by the Protocols and national legislation. Moreover, in the unlikely event such legislation were passed by the Congress, it is our view that such a bill would be vetoed by the President, and that such a veto could not be overridden.

But most importantly, in our view, the quid pro quo is necessary, and desirable, because it sets the stage for the enactment of national legislation -- complemented by U.S. ratification of the CLC/Fund Protocols and retention of other state law programs (including funds generated by industry) -- in order to provide substantial liability and available funds to efficiently and fully compensate cleanup costs and damages from oil spills. Through enactment of this comprehensive national law, the opportunity exists for the first time in our nation's history to have in place a regime dealing with oil spills that:

* fairly assigns risk and internalizes the costs of transporting and handling oil among the spiller and the industry;

* ensures rapid repair, restoration and rehabilitation or replacement of damaged or destroyed natural resources;

* completely reimburses spill victims, including third party damages, and compensates the public for loss of use and enjoyment of natural resources; and

* provides more effective incentives for preventing oil discharges.

Although the ratification of the Protocols and the retention of necessary state laws are discussed in more detail below, I would like to give one example of how the comprehensive regime could work. If a catastrophic oil tanker spill were to occur off the U.S. coast,[7] under provisions contained in H.R. 5300 as much as $430 million would be available by "stacking" the Protocols under comprehensive national legislation. In addition, states would be free to supplement those monies with state funds generated from industry assessments. As noted earlier, several of those state funds are open ended, although currently available funds range from about $1 million (Maryland and New Hampshire) upwards to $34 million (New Jersey). Prior to entry into force of the Protocols, there would still be as much $260 million available at the national level -- up to $60 million liability for the spiller, and an additional $200 million from the Oil Spill Liability Trust Fund paid for by the oil industry.

How much money is enough? While we need to be prepared to deal with any spill, whatever its consequences, historical spill records suggest that the funds available under the House approach are extremely likely to fully compensate all cleanup and damages for catastrophic spills. To date, the Amoco Cadiz spill stands as the benchmark. Leaving aside the claims for prejudgment interest and inflation linked with the litigation delays -- which could be even more than the underlying claims (and not pertinent when available "funds" could provide expeditious payouts) -- the Republic of France, and the communes and business concerns in the Brittany region have claims pending that range from less than $200 million to upwards of $400 million for cleanup costs and damages.[8]

Within U.S. waters, there have been no oil spills, from either vessels or oil rigs, for which cleanup and damage claims are anywhere close to those involving the Amoco Cadiz. From the Oceanic Society's perspective, a comprehensive regime for oil spill liability and compensation does need to be fully responsive to any spill impacting our nation's citizens and natural resources. Given the spill response capability that exists within the U.S. Coast Guard, in combination with industry assistance, state and local efforts, it is our view that the total costs of any

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7. Under this hypothetical example, it is assumed that the spiller does not engage in any negligent acts that would result in unlimited liability.

8. See, e.g, Oil Spill Intelligence Report, Volume VIII, No. 9, 8 March 1985.

spill that might occur would be covered under the comprehensive regime we have described. Even where those costs are substantial, the ready access to funds would significantly enhance expeditious response action and claims settlement, avoiding the costs of lengthy delays (prejudgment interest and inflation) that have skyrocketed the Amoco Cadiz claims.

2. Other Provisions

Other differences exist between S. 2340 and H.R. 5300. The Oceanic Society stands ready to assist the Members of this Committee, and others, in fashioning approaches that assist in achieving expeditious agreement on a comprehensive regime for oil spill liability and compensation. Without attempting to comment on all the differences between those two bills, I have attached as Appendix A a list of issues that we believe merit attention in formulating an effective comprehensive law.

As referenced in that attachment, one issue of special importance involves the coverage for natural resource damages. In that regard, we believe that S. 2340's provisions are superior to those contained in H.R. 5300. Your bill contains a much more comprehensive scope of coverage for natural resources (Sec. 3(a)(2)); it provides for specific research and regulatory measures on this subject (Secs. 5(a)(9),(e)); and it authorizes the Fund to compensate for natural resource damage claims (Sec. 5(a)), which is conspicuously absent in H.R. 5300). As another example, S. 2340 provides for the transfer of Trans-Alaska Pipeline Liability Fund monies to the new national Fund (Sec. 8(a)), which we support. In contrast with that measure, though, we prefer the House approach transferring CWA funds back to the general Treasury (Sec. 6302(c)(9)), since those public monies should not be used to underwrite the national Fund. We also support H.R. 5300's provision providing its Fund with borrowing authority (Sec. 9505(d)), a matter on which S. 2340 is silent.

Consistent with the Oceanic Society's views on the need for uniform national liability limits, our list of issues references support for some of the limits contained in H.R. 5300 (Sec. 6104 (b)(1)), although we believe that those applicable to both inland barges and facilities need to be raised significantly. Moreover, given our support for the recently revised international regime, as discussed in the following subsection, the Oceanic Society supports the inclusion of language similar to H.R. 5300's (Sec. 6102 and Part 4), which set out the relationship between the national and international components of a comprehensive regime.

B. CLC/Fund Protocols

As is well known to Members of this Committee, in the Spring of 1984 both of the CLC and Fund Conventions, described earlier, were significantly improved at a diplomatic conference in which the U.S. delegation played a leading role. As a private sector advisor on that delegation, I had the opportunity to witness first hand those negotiations. From an environmental perspective, the 1984 CLC/Fund Protocols certainly are not perfect. However, on balance the Oceanic Society believes that they serve as a necessary global "common denominator" which merit U.S. ratification.

In testimony by the Society before the Senate Committee on Foreign Relations on May 15, 1986, I presented several reasons for supporting U.S. ratification of the Protocols. Summarily stated, those reasons are as follows. First, there are substantial increases in the liability and compensation that will be borne by shipowner and cargo interests under the Protocols. Second, the extension of the geographic scope of coverage to include coastal state 200-mile Exclusive Economic Zones significantly expands the original Conventions' territorial sea focus. Third, the Protocols clarify and improve the definition of "pollution damage." Fourth, the definition of "incident" was revised to clearly include pre-spill threat amelioration measures. Fifth, the categories of vessels covered was substantially broadened concerning both unladen tankers and combination carriers.

Other testimony introduced into the record for that hearing noted that it is often difficult, or impossible, to obtain jurisdiction over foreign shipowners. Even if jurisdiction is obtained against a shipowner in a U.S. court, it can be very difficult to get the country where the ship is registered to enforce our judgment. Finally, most states do not require shipowners to demonstrate financial responsibility, so there is no way to ensure the existence of insurance or assests sufficient to satisfy a large judgment, absent a regime such as that proposed under the Protocols.[9]

As has often been said, the only boundaries that our ocean ecosystem knows are artificially created political ones. It is

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9. It should also be noted that ships passing the U.S. coast -- either in innocent passage through our territorial sea or Exclusive Economic Zone, but not entering a U.S. port -- can not be subjected to U.S. jurisdiction. However, such jurisdiction (and international Fund protection) would be available under the Protocols. It has been estimated that roughly 10% of vessels in U.S. coastal waters fall under this category.

essential that the global community cooperate in the continuing effort to protect and preserve our ocean resources. The Protocols provide one important opportunity for the United States to do so. Given this global context, I would also note that the members of the International Union for Conservation of Nature and Natural Resources (IUCN) -- which includes 55 non-governmental conservation organizations based in the U.S. -- adopted a resolution at their most recent General Assembly (Madrid, 1984) urging governments throughout the world to ratify the Protocols as soon as possible. Attached as Appendix B is a copy of that resolution, as well as a more detailed description of IUCN.

Focusing only on the United States, the Oceanic Society supports U.S. ratification of the CLC/Fund Protocols because we believe that those global agreements -- in combination with an environmentally sound national regime and the retention of complementary coastal state cleanup and compensation laws and funds -- can assist in our efforts to ensure that victims are fully compensated. While the CLC Protocol would require the preemption of additional liability against shipowners under national or state law for those vessels covered, the Protocols do not preclude national or state laws from providing additional funds.

In this regard, it was encouraging to see that H.R. 5300 improves upon the prior House-passed bill (H.R. 2005) by including an amendment that specifically recognizes the so-called "stacking" relationship between the Protocols and the national Fund (Sec. 6104(d)(3)). As mentioned in my earlier example of the substantial funds that would be available for a comprehensive regime, the CLC/Fund Protocols could provide as much as $230 million for a single vessel spill, before or after claims are presented to a comprehensive national fund (up to $200 million more) or state funds.

C. State Laws

On each occasion when the Oceanic Society has presented testimony on the subject of oil spill liability and compensation, we have noted our interest in hearing, in greater detail, the views of state officials. State concerns obviously are critical to fashioning any acceptable new regime. In recent months, a number of states, as well as the Coastal States Organization, have voiced views about both national legislation and the Protocols. The overwhelming sentiment we have heard is that state officials are not that troubled by the prospect of preemption of their right to set separate liability limits for vessels covered under the Protocols and a comprehensive national law, as long as their other state laws and programs, including special funds, are preserved.

Under a comprehensive regime, states face the prospect of gaining access to substantial funds through enactment of national legislation, as well as U.S. ratification of the Protocols. These complementary approaches will enhance protection of state resources and compensation of their citizens. Aside from the potential amount of money that would be made available, expeditious payment of claims is also an important consideration. For a fisherman or hotelier whose livelihood is at stake, or for the state's public trustee who lacks the funds to restore an estuarine sanctuary or reseed a clam bed, the prospect of quick payment provisions in H.R. 5300 and the CLC/Fund Protocols stands in stark contrast to the 8-year delay that the Amoco Cadiz spill claimants have thus far experienced.

As the House legislation has evolved, especially during this Congress, several noteworthy provisions have been added to better address state interests. Most importantly, H.R. 5300 (Sec. 6110) now preserves, without restriction, the right of state governments to maintain or establish their own pollution compensation funds (Sec. 6110). Alaska, Florida, Maine, New Jersey and other states with special funds now on the books are free to retain them, and to increase them to whatever size they deem appropriate, with the revenue generated from industry assessments.

In addition to that right, several other features of H.R. 5300 merit mention. States also are not preempted from imposing civil penalties for violating their oil pollution statutes (Sec. 6110(d)). Coastal states bordering on Canada and Mexico can tap the national Fund when spills result from "offshore foreign units" (Sec. 6104(d)(2)). We also support the amendment (Sec. 6109(a)) which deletes the adjective "exclusive" when referring to jurisdiction authority of courts, thereby recognizing the competence of state courts to address oil spill liability issues addressed in national legislation.

The Oceanic Society remains interested in supporting other state concerns that would enhance the effectiveness of a comprehensive regime. In recent months, it has come to our attention that some states would like to see specific provisions providing for substantial direct draws for use in undertaking cleanup, for language which allows states to receive monies from the national Fund without first presenting claims to the spiller, and for state/national concurrence on "how clean is clean?" in dealing with natural resource restoration. Each of these proposed revisions has merit, and the Oceanic Society stands ready to work with state officials, your staff and others in formulating measures to address them effectively.

Conclusion

Mr. Chairman, the Oceanic Society's interest in this issue is to work with Members of your Committee, and others, to achieve essential advances in the legal, financial and institutional framework that is needed to protect people, real and personal property, and our ocean and coastal resources from the inevitable occurrence of oil spills.

We appreciate greatly the time and attention that you and your Committee are devoting to this issue, and your leadership role on matters, generally, that affect the quality of our environment. With a cooperative spirit among all interested parties, we believe that comprehensive legislation can be enacted this Congress to provide the framework for full and effective protection from oil spills. Again, I appreciate the opportunity to participate in this hearing on behalf of the Oceanic Society. I would be glad to answer any questions you or other Members might have.

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Appendix A

Listing of the Oceanfc Society's Principal Concerns Regarding Differences Between S. 2340 and H.R. 5300

(1) the definition of "natural resources" contained in S. 2340 is preferable to the House version, given its more descriptive reference to "land, wildlife, biota, air, water, and other such resources..." (Sec. 2(9)).

(2) the scope of liability for natural resource damages, as contained in S. 2340 (Sec. 3(a)(2)) is significantly better than that in H.R. 5300 (Sec. 6103), given its provisions concerning "loss of use of natural resources" that does not condition the loss on a showing of subsistence use, and the broader coverage for "loss of profits or impairment of earning capacity" that does not include a two-year statute of limitations or the need to show that a loss of profits represents at least 25% on the claimant's earnings.

(3) the role of the President as trustee claimant with respect to natural resource losses is more appropriately framed in S. 2340 (Sec. 102(b)) than in H.R. 5300 (Sec. 6103(c)(2)).

(4) H.R. 5300's liability limits (Sec. 6104(b)(1) should be substituted for the conceptual provisions in S. 2340 (Sec. 3(c)(1)), but the limits for inland oil barges and facilities should be substantially increased (including the possibility of a more open ended approach for offshore oil rigs given that compensation under the Protocols applies only to vessels).

(5) H.R. 5300's provision that the liability limits do not apply where the spiller fails or refuses to report an incident (Sec. 6104(b)(2)(B)) should be added to S. 2340 (Sec. 103(c)(2).

(6) both S. 2340 and H.R. 5300 should add a provision that incorporates inflation adjustments and increased damage potential with respect to liability limit revisions (See, S. 681, Sec. 102(c)(5)).

(7) the Oil Spill Liability Fund established in S. 2340 (Sec. 4) should be allowed to accumulate funds up to $300 million, with per incident payments of up to $200 million (in addition to spiller liability) consistent with H.R. 5300 (Sec. 9505(c) and (d)).

(8) S. 2340's provisions requiring the Fund to compensate for natural resource damages and damage assessment-related research (Sec. 5(a)(6), (7) and (9)) are far superior to the more restricted uses of the House Fund (Sec. 9505(c)(1)).

(9) S. 2340's provisions concerning the deadlines for presentation of claims to the Fund (Sec. 5(b)(3)(E) are superior to those contained in H.R. 5300 (Sec. 6107(k)), but an environmentally stronger description would be preferable in relation to when "discovery" of a loss occurs.

(10) S. 2340's provisions regarding the issuance of natural resource damage-related regulations (Sec. 5(e)), including the "rebuttable presumption" on behalf of claimants, are far better than the cursory reference to regulations contained in H.R. 5300 (Sec. 6304).

(11) consistent with S. 2340 (Sec. 8)), the substantial monies available in existing national funds generated from industry assessments (TAPAA, DWPA and OCSLAA) should all be transferred to the Oil Spill Liability Fund, thereby providing a larger start-up base.

(12) the general revenue monies existing under the CWA's Sec. 311(k) revolving fund should be returned to the Treasury (as per H.R. 5300, Sec. 6302(c)(9)), consistent with the "polluter pays" principle.

(13) there should be a provision for borrowing authority, such as that contained in H.R. 5300 (Sec. 9505(d)), to ensure that sufficient monies are available to compensate claimants in the event the Fund's reserves are inadequate.

(14) consistent with our views on the Protocols, provisions similar to those contained in H.R. 5300 (Sec. 6102 and Part 4) should be included in order to set out the relationship between the domestic and international components of a comprehensive regime in relation to vessels covered by both. We similarly support H.R. 5300's provision (Sec. 6104(d)(3) providing for a "stacking" relationship between the Protocols and the national Fund.

(15) we strongly support the inclusion of a provision which expressly repeals the application of the 1851 Limitation of Liability Act, which H.R. 5300 accomplishes through a general provision (Sec. 6104(h)).

(16) although S. 2340 does not expressly provide for any definite term for its Fund to function, or any sunset provisions, there should be express reference to its continuing nature, as opposed to the sunset provisions contained in H.R. 5300 (Sec. 9505(d)(4)).

(17) given the experience of the Ixtoc-I oil rig blowout in the Gulf of Mexico's Bay of Campeche, which resulted in cleanup costs and damages within U.S. territory, we strongly support the inclusion of the provisions in H.R. 5300 (Sec. 6104(d)(2)) that make the Fund liable for "foreign offshore units."

(18) with respect to onshore facilities and spills involving vessels or facilties in state waters, national legislation should serve as the threshold level for liability and compensation requirements, with states permitted to enact additional measures.

(19) state rights to maintain or establish their own pollution compensation funds should be preserved, and they should have the continuing right to imposed civil penalties, as provided for in H.R. 5300 (Sec. 6110). On a related matter, jurisdictional authority to address oil spill liability and compensation issues should not be "exclusively" vested in federal courts, in order to preserve appropriate state court jurisdiction (H.R. 5300, Sec. 6109(a)).

(20) neither S. 2340 or H.R. 5300 contains specific provisions that would enhance the prospect of effective public participation (e.g, provisions concerning citizen suits, class actions and attorney's fee awards), and we would encourage consideration of their inclusion in comprehensive legislation.

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Appendix B

International Union for the Conservation
of Nature and Natural Resources
16th Session of the General Assembly
5-14 November 1984, Madrid, Spain *

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16/15. LIABILITY AND COMPENSATION FOR OIL SPILLS FROM VESSELS

CONSCIOUS of the dangers of pollution posed by the worldwide maritime carriage of oil;

CONVINCED of the need to ensure that adequate funds are available to compensate persons who suffer damage caused by pollution resulting from the escape or discharge of oil from vessels; and to ensure rapid repair, restoration and rehabilitation of damaged natural resources in marine and coastal areas caused by such pollution;

BELIEVING that the costs of pollution damage resulting from the maritime carriage of oil should be borne by the shipping industry and by the oil cargo interests; in accordance with the polluter pays principle;

AWARE that the efforts of the International Maritime Organization (IMO) and States resulted in a diplomatic conference, in London in 1984 adopting Protocols to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (Fund); and

BELIEVING that those 1984 Protocols significantly improve the existing CLC and Fund Conventions, in respect of availability of funds, liability and coverage;

The General Assembly of IUCN, at its 16th Session in Madrid, Spain, 5-14 November 1984:

1. RECOMMENDS that States that are Parties to the 1969 CLC and 1971 Fund Conventions, and all other States, ratify or accede to the 1984 Protocols to those Conventions and deposit those instruments of ratification or accession with the Secretary General of the IMO as soon as possible;
2. ENCOURAGES the IMO, in cooperation with other international organizations, States and non-governmental organizations, to promote actively throughout the world the signature and ratification by Governments of the 1984 Protocols; and
3. FURTHER ENCOURAGES IUCN members, in particular, to assist in this effort.

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* The IUCN is an independent international non-profit organization that is governed by a General Assembly comprised of its members. As of September, 1984 there were 501 members from 114 countries, in three categories: 57 state members; 123 government agencies; 315 non-governmental organizations; and 6 non-voting affiliates. The General Assembly meets every three years to approve IUCN's programme and budget for the coming triennium. The permanent Secretariat for IUCN is located in Gland, Switzerland. Forty-four recommendations and resolutions, including this one, were adopted at IUCN at its Madrid General Assembly.

TESTIMONY

Sharron Stewart
Gulf Coast Fishermen's Environmental Defense Fund

before the
Committee on Environment and Public Works

U.S. Senate
99th Congress
Washington, D.C.

September 10, 1986

Mr. Chairman and members of the Committee, I am Sharron Stewart, Vice President of Gulf Coast Fishermen's Environmental Defense Fund, located in Freeport, Texas. We appreciate the opportunity to express our views before your committee today. Our organization serves to insure the viability of the renewable resources of the Gulf of Mexico. Our membership ranges from Florida to the tip of Texas and consists of commercial fish harvesters and producers and others associated with the fishing industry, such as welders, net shop owners, and supply house operators. What makes us unique is that our membership also consists of charter boat operators and sports fishermen.

I. Need

The need for an adequate oil spill liability and compensation regime was addressed by the Ninety-Fourth Congress, and reflected in the Congressional Record of the Ninety-Sixth Congress. That record was supplemented during the Ninety-Seventh and Ninety-Eighth Congresses. We are pleased to see that the Ninety-Ninth Congress is considering action on this issue, and it is our hope that an effective oil spill regime can be enacted into law before you adjourn.

We believe the problem must be addressed in three arenas: the international level, the national level, and by the states. For this reason we support, with specific reservations:

A. Ratification of the International Protocols

B. Comprehensive Federal Oil Pollution Liability and Compensation Legislation

C. No Preemption of State Oil Spill CleanUp Programs or Funds

This position was not arrived at easily, due to our strong belief that the polluter must pay in all instances for damage done. Unfortunately, this is not the current practice. Even when the polluter is identified, the damages paid do not compensate adequately for lost income (direct or indirect), and loss of natural resources. In our view, the 3-fold approach mentioned above is the best and most effective way to ensure that all cleanup costs and damages are fully compensated.

II. The 1984 CLC and Fund Protocols

We support the efforts that were undertaken by the United States to improve the original 1969 CLC and the 1971 Fund Conventions (hereafter, the Protocols). The following four improvements merit special mention:

A. Both the increased liability and compensation limits of the ship and cargo owners, and the total per incident compensation maximum appear adequate. The tacit amendment provisions for updating the limits once the Protocols are in force provides a mechanism for increasing limits to account for inflation rates and spill experience.

B. The extension of the Protocols to cover coastal states' 200 mile Exclusive Economic Zone is important to establish certainty for coverage of offshore spills.

C. Coverage of unladen as well as laden tankers, and combination carriers, and the shifting of the burden of proof to carrier owners that there is no oil on board as a result of prior voyages, increases the likelihood of proving damages.

D. The term "pollution damage" was appropriately clarified to specify environmental restoration costs as compensable damages. On a related point, the new definition of "incident" allows appropriate authorities to take action during a pre-spill threat.

One remaining concern with regard to the international Protocols relates to the negligence standard used to eliminate application of the liability limits. The only circumstance whereby an owner is not entitled to limit his liability under the Protocols is if "it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result." We find this burden of proof much more strict for the plaintiff than currently exists in Section 311 of the Clean Water Act. Where negligence or misconduct are shown, the owner and/or operator should have unlimited liability. Under the Protocols, the owner may be negligent and still be able to retain the liability limitation. This issue should be better addressed by federal legislation.

Ratification of the Protocols alone will fall far short of solving the problem. Without strong federal legislation that covers cleanup costs and damages not covered by the international regime, in combination with state programs designed to meet their specific needs, we will still not have a body of law that will adequately ensure quick clean-up when possible, restore natural resources, mitigate loss of resources and compensate victims of oil spills.

III. Federal Legislation

The following list of points highlight our views with regard to issues raised in S. 2340, H.R. 2005 and H.R. 5300, and several other issues that should be addressed.

A. State compensation funds should not be preempted, nor should there be restrictions on fund size or use. The state's authority to tax oil imports for financing the state compensation fund must be maintained.

B. If the international Protocols are ratified with their present liability limits, a federal compensation fund is necessary to cover damages in excess of the amount for which the owner is liable. The federal fund should supplement the international fund to afford greater coverage, giving real effect to the so-called "stacking" or "top-off" concept.

C. All types of damages must be recoverable. Specifically, natural resource damage assessment costs incurred by the State or Federal government must remain as a compensable damage. In this regard, we support Section 5(a) of S. 2340.

D. State courts must be granted jurisdiction over cases brought under the international Protocols and national legislation.

E. The term "speculative claims," referring to claims not covered by international or national legislation, must be more specifically defined. Claims for long-term resource damage (not immediately apparent or proven) should be covered by international or national legislation and must be excluded from the definition of "speculative claims."

F. Insurer guarantees must be available and standardized worldwide to certify that the insurer is financially able to make the payments necessary under the CLC Protocols.

G. Hazardous substances and hazardous wastes should not be included in the definition of "oil" under international or national legislation. Currently proposed liability limits under the Protocols and federal legislation reflect the risks associated with oil spills. Spills of hazardous materials or hazardous wastes have the potential to be much more costly, and the proposed legislation and Protocols do not provide a suitable mechanism for addressing this problem. Further, as the compensation funds are to be established by taxing crude oil receipts, adding hazardous substances and hazardous wastes to damage claims places an unfair burden on the oil industry by forcing them to assume responsibility for risks over which they have virtually no control.

H. The liability limits as proposed in H.R. 2005 and H.R. 5300 for inland barges ($150,000) and for facilities ($50 million) are far too low to cover potential risks. No logical reason exists for treating oil spilled from barges and facilities differently from oil spilled from vessels. The risks and potential damages are the same. Therefore, the liability limits should be comparable.

I. The 1851 Limitation of Liability Act must be superceded or repealed to avoid a conflict between the potentially very low liability limits of that Act and the proposed higher liability limits of the Protocols and federal legislation.

J. There must be a reallocation of USCG Strike Team oil spill equipment to the Gulf Coast. This request has been made often in the past, and has been refused. This refusal is unacceptable, as the time delays required for moving equipment to the Gulf significantly increase the exposure of Gulf resources to unnecessary damage. In addition, this delay greatly impedes the ability to act in the first crucial hours of the spill when damage mitigation efforts are most effective.

The Gulf coast carries the burden of off-shore development for the U.S., with over 3000 rigs and eight of the top ten ports for oil imports (based on volume) in the United States. Consequently, the exposure of our coastline to damage from oil spills is much greater than it is for other coasts. This high exposure is a fact recognized internationally in a report prepared in 1979 by the Oil Companies International Marine Forum (OCIMF), Higher Risk Sea Areas -- A Risk Analysis. Prepared as a worldwide risk analysis of the high risk sea areas for oil spills, this report cites the Gulf of Mexico as one of nine areas worldwide determined to be a high risk area. This assessment was based on such regional characteristics as: oil volume and traffic density; depth of water (shallowness); offshore oil rigs; navigation marks, traffic diversity; narrow passages; and the seasonality of visibility and weather.

If new equipment cannot be purchased, then it should be moved from other coasts to a Gulf location. Moving the equipment from the Gulf coast to the east or west coasts, if needed, would be no more difficult than the present situation which requires that equipment be shipped to the Gulf from an Atlantic or Pacific coast location.

K. States must have concurrent rights with the federal government when the final cleanup determination is made.

L. It has been proposed that the States have immediate and direct access to the Oil Spill Liability Trust Fund up to $50,000 for the purposes of immediate response. The Federal-State agreement to be developed for accessing this fund under this proposal is also to include a procedure for the State to commit additional sums for response to a particular incident. While we applaud the spirit of this proposal, we feel that $50,000 is too severe a limitation. The states have neither the personnel nor the equipment to perform the actual cleanup work resulting from a spill, and would have to contract with private

enterprises to fill this role. These contractors, particularly when asked to respond to a large incident, may find that the $50,000 the states could guarantee would not cover payment for the work to be performed. Therefore, states would have difficulty in obtaining a contract and making use of the fund access offered. We believe that $250,000 would be a more appropriate ceiling for immediate drawing rights. We understand that the Federal OSC also only has immediate drawing rights up to $50,000. It should also be considered that the Federal OSC limit be raised as well for the same reasons, particularly when outside contractors must be used.

In addition, we strongly believe that the language for drawing rights and contract development be clearly stated in the legislation. This would provide for greater uniformity nationwide, would ensure that the contracts are available to the states and that they meet the intent of the legislature. The abuse of such discretion has been shown clearly under the CERCLA provision for Federal-State cooperative agreements for removal actions. No state has currently been able to obtain such an agreement with the EPA despite repeated requests by several states, including Texas. The interaction between the Federal OSC and the State, which may simultaneously want to draw from the fund for the same incident, needs to be clarified for fund drawing rights. The proposed amendments for the direct draw authority need further clarification.

M. The international Protocols apply only when a foreign sea-going tanker is involved in an oil spill. Therefore, national legislation must cover all other sources of oil spills. This should include, but not be limited to, onshore and offshore facilities, inland barges, U.S. flag vessels, foreign flag ships of non-member nations, and foreign and domestic offshore units.

N. The national legislation should impose liability limits to cover these other sources listed above to levels that meet or exceed amounts that are

comparable to those dealt with in the international Protocol limits. Language should be included to adjust limits upward as changing economic conditions may require.

O. We suggest that, for the purposes of research and assessment of damages, that the National Oceanic and Atmospheric Administration, as a result of its "designated mission," take the lead in coordinating the work to be performed.

P. The national legislation should have language that clearly rejects the finding in the M.V. Testbank case that indirect economic loss, even though foreseeable, is not compensable in maritime tort except for those who sustain physical damage to a proprietary interest. In that case, fishermen who made their living from fishing in the area were compensated for the spill of pentachlorophenol. However, marina and boat rental operators, wholesale and retail seafood enterprises, restaurants, tackle and bait shops and other similar establishments were held to have no claim. Had the spill occurred on land, such damages would have been compensable, provided the spill was foreseeable.

IV. MAJOR GULF SPILLS

A. Burma Agate. In early November 1979, the tanker Burma Agate collided with the freighter Mimosa approximately 5 miles off the coast of Galveston, Texas. Approximately 21 thousand metric tons of oil burned in the ensuing fire. Seven thousand metric tons dispersed offshore, of which only ten percent was recovered. The spilled oil was observed to have had an impact on the Texas coast as far as 270 km away from the wreck site.

A total of over $20,000,000 in damages were filed for. The State received $50,000 and the settlement was not characterized as to the types of damages. Other claimants were not compensated.

B. IXTOC I. The June 3, 1979 blowout of a drilling rig in the Bay of Campeche, Mexico, resulted in a release of half a million metric tons of oil into the Gulf of Mexico. Surface oil entered U.S. waters two months later and moved northward into Louisiana. In early September, shifts in the Gulf current resulting from Tropical Storm Claudette, caused the creeping spill to reverse directions back toward Mexico. Between four and eleven metric tons of oil affected Gulf Coast beaches, and floated offshore in tar mats. Five to ten times that much is estimated to have passed through the Texas OCS in the form of mousse. The ultimate fate of the oil remains unresolved, although the weathering and physical breakup process, followed by distribution of small tarry particles in surface and subsurface waters in the Gulf of Mexico, seems likely.

During that spill, NOAA, in coordinating with other federal and state agencies, developed a draft damage assessment plan for onshore and offshore areas. The estimated cost of implementing that plan was $4-10 million. Unfortunately, the plan was never implemented and a major opportunity was lost to gain a better understanding of that spill's impact on our marine and coastal resources. While the Bureau of Land Management did undertake a $1.2 million study that assessed both IXTOC-I and the Burma Agate, there were many errors in the methodologies that were employed, and the results were inconclusive.

The Federal government sued for more than $12.5 million in clean up costs, and settled for $2 million. The State of Texas sued for $10 million for costs of mitigating, preventing and cleaning up the resultant pollution, plus damages to natural resources and loss of tax revenue. Because the natural resources

damages could not be assessed, the State settled for $100,000. Four other class action suits, totaling nearly $500 million, were settled for $2.14 million.

C. M.V. Alvenus. A particularly distressing spill occurred in June 1984, when the British tanker Alvenus, carrying 14 million gallons of crude oil, grounded and broke apart just off the Texas/Louisiana coast. Almost two million gallons of oil, representing only a fraction of that which was on board, was released and most of it reached the Texas coast. The remaining oil was removed from the tanker over a 14-day period during favorable weather conditions. They did not finish sand blasting the rocks and groins along the Galveston seawall until the end of the Summer, 1985, and even now oil remains in adjacent beach sands. Bad or even moderate weather conditions could have resulted in a truly catastrophic oil spill. Settlement negotiations for compensation are now underway.

These incidents in the Gulf reflect problems associated with providing effective cleanup, natural resource restoration, and damage awards, when oil spills occur. They underscore the importance of having in place more effective measures.

* * *

In conclusion, the Gulf Coast Fishermen's Environmental Defense Fund supports action by Members of this Committee, and by the Ninety-Ninth Congress, that will result in U.S ratification of the Protocols, enactment of a comprehensive federal law, and no preemption of state oil spill cleanup programs or funds, consistent with the additional concerns addressed in our testimony. We look forward to working with you to accomplish that objective. Thank you.

II

99TH CONGRESS
2D SESSION

S. 2799

To consolidate and improve Federal laws providing compensation and establishing liability for oilspills.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 9 (legislative day, SEPTEMBER 8), 1986

Mr. MITCHELL (for himself, Mr. STAFFORD, Mr. LAUTENBERG, Mr. BAUCUS, Mr. DURENBERGER, Mr. HUMPHREY and Mr. MOYNIHAN) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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A BILL

To consolidate and improve Federal laws providing compensation and establishing liability for oilspills.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Oil Pollution Liability and Compensation Act of 1986".

TITLE I—OIL POLLUTION LIABILITY AND COMPENSATION

DEFINITIONS

SEC. 101. For the purposes of this Act—

(1) the terms "vessel", "public vessel", "owner or operator", "remove" or "removal", "contiguous zone", "onshore facility", "offshore facility", and "barrel" shall have the meaning provided in section 311(a) of the Clean Water Act;

(2) the terms "person", "navigable waters", "territorial seas" shall have the meaning provided in section 502 of the Clean Water Act;

(3) the term "act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care or foresight;

(4) the term "claim" means a request, made in writing for a sum certain, for compensation for damages or removal costs resulting from a discharge of oil;

(5) the term "claimant" means any person who presents a claim for compensation under this Act;

(6) the term "damages" means damages for economic loss or the loss of or injury to natural resources as specified in section 102(a) of this Act;

(7) the term "deepwater port facility" means an offshore facility which is or was licensed under the Deepwater Port Act of 1974;

(8) the term "discharge" means any emission, intentional or unintentional, into the environment, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying or dumping;

(9) the term "environment" means the navigable waters, the waters of the contiguous zone, the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson Fishery Conservation and Management Act, adjoining shorelines, and the ambient air above such waters and shorelines;

(10) the term "foreign offshore unit" means a structure or group of structures which is located, in whole or in part, in the territorial sea or on the continental shelf of a foreign country and is or was used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the seabed beneath the foreign country's territorial sea or from the foreign country's continental shelf;

(11) the term "Fund" means the Oil Spill Compensation Fund, hereby established under this Act;

(12) the term "guarantor" means any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or opera-

tor under this Act or section 311(p) of the Clean Water Act;

(13) the term "lessee" means a person holding a leasehold interest in an oil or gas lease on submerged lands of the Outer Continental Shelf, granted or maintained under the Outer Continental Shelf Lands Act;

(14) the term "liable" or "liability" under this Act shall be construed to be the standard of liability which obtains under section 311 of the Clean Water Act;

(15) the term "mobile offshore drilling unit" means a vessel capable of use as an Outer Continental Shelf facility to drill for oil;

(16) the term "natural resources" includes land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone estblished by the Magnuson Fishery Conservation and Management Act), any State or local government, or any foreign government;

(17) the term "oil" means petroleum, including crude oil or any fraction or residue therefrom;

(18) the term "Outer Continental Shelf facility" means an offshore facility which is located, in whole or in part, on the Outer Continental Shelf and is or was used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the Outer Continental Shelf;

(19) the term "owner or operator" means—

(A) with respect to an Outer Continental Shelf facility other than a pipeline or mobile offshore drilling unit, the lessee or permittee of the area in which the facility is located, or the holder of a right of use and easement granted under the Outer Continental Shelf Lands Act for the area in which the facility is located (where the holder is a different person than the lessee or permittee);

(B) with respect to a mobile offshore drilling unit being used as an Outer Continental Shelf facility, from which oil is discharged on or above the surface of the water (or which posed a substantial threat of such a discharge), the owner or operator of the unit, and such unit shall be deemed to be a tanker;

(C) with respect to a mobile offshore drilling unit being used as an Outer Continental Shelf facility—

(i) from which oil is discharged on or above the surface of the water (or which posed a substantial threat of such a discharge), to the extent removal costs or damages exceed the limitation specified in section 102(c)(1)(A), or

(ii) from which oil is discharged below the surface of the water (or which posed a substantial threat of such a discharge),

the permittee of the area in which the unit is located, or the holder of a right of use and easement granted under the Outer Continental Shelf Lands Act for the area in which the unit is located (where the holder is a different person than the lessee or permittee);

(20) the term "permittee" means a person holding an authorization, license, or permit for geological exploration issued under section 11 of the Outer Continental Shelf Lands Act;

(21) the term "removal costs" means the costs of removal taken after a discharge of oil has occurred or where there was a substantial threat of a discharge of

oil, to prevent, minimize, or mitigate oil pollution from that incident, including all costs of completing removal as determined under section 106(d);

(22) the term "tanker" means a vessel constructed or adapted for the carriage of oil in bulk or in commercial quantities as cargo; and

(23) the terms "United States" and "State" mean the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction.

LIABILITY

SEC. 102. (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section, the owner or operator of a vessel or an onshore or offshore facility from which oil is discharged, or which posed the threat of a discharge which causes the incurrence of removal costs, shall be liable for—

(1)(A) all removal costs incurred by the United States Government or a State under subsection (c), (d), (e), (f)(4), or (l) of section 311 of the Clean Water Act or under the Intervention on the High Seas or section 18 of the Deepwater Port Act of 1974; and

(B) any removal costs incurred by any person, including, but not limited to, any State; and

(2) all damages or economic loss or loss of natural resources resulting from such a discharge, including—

(A) any injury to, destruction of, or loss of any real or personal property;

(B) any loss of use of real or personal property;

(C) any injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss;

(D) any loss of use, including loss of subsistence use, of any natural resources, without regard to the ownership or management of such resources;

(E) any loss of income or profits or impairment of earning capacity resulting from injury to or destruction of real or personal property or natural resources, without regard to the ownership of such property or resources; and

(F) any direct or indirect loss of tax, royalty, rental, or net profits share revenue by the Federal Government or any State or political subdivision thereof, for a period of not to exceed one year.

(b)(1) There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the discharge or threat of discharge of oil and the damages resulting therefrom were caused solely by—

(A) an act of God;

(B) an act of war;

(C) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (i) the defendant exercised due care with respect to the oil concerned, taking into consideration the characteristics of such oil, in light of all relevant facts and circumstances, and (ii) the defendant took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(D) any combination of the foregoing paragraphs.

(2) In any case where the owner or operator of a vessel or an onshore or offshore facility can establish by a prepon-

derance of the evidence that a discharge and the damages resulting therefrom were caused solely by an act or omission of a third party in accordance with paragraph (1)(C) (or solely by such an act or omission in combination with an act of God or an act of war), such third party shall be liable under this section as if such third party were the owner or operator of a vessel or onshore or offshore facility from which the discharge actually occurred. Where the owner or operator of a tanker or an onshore or offshore facility which handles or stores oil in bulk or commercial quantities, from which oil is discharged, alleges that such discharge was caused solely by an act or omission of a third party, such owner or operator shall promptly pay to the United States Government, and any other claimant, the costs of removal or damages claimed and shall be entitled by subrogation to all rights of the United States Government or other claimant to recover such costs of removal or damages from such third party under this subsection.

(c)(1) The liability of an owner or operator of a vessel or an onshore or offshore facility for damages and removal costs under this section for each discharge or incident shall not exceed—

(A) $420 per gross ton or $10,000,000, whichever is greater, of any tanker carrying oil in bulk or in

commercial quantities as cargo, including any such barge operating in the navigable waters;

(B) $300 per gross ton or $500,000, whichever is greater, of any other vessel;

(C) the total of all removal costs under subsection (a)(1) of this section plus $75,000,000 for any Outer Continental Shelf facility;

(D) $100,000,000 for any deepwater port facility (including the liability of the licensee for a discharge from any vessel moored at such port, in any case where $100,000,000 exceeds $420 per gross ton of such vessel); or

(E) $100,000,000 for any other onshore or offshore facility.

(2) Notwithstanding the limitations of paragraph (1) of this subsection, the liability of the owner or operator of a vessel or an onshore or offshore facility under subsection (a) of this section shall be the full and total damages and removal costs not offset by any removal costs incurred on behalf of such owner or operator, if (A) the discharge of oil was the result of willful misconduct or gross negligence within the privity or knowledge of the owner or operator or of a violation (within the privity or knowledge of the owner or operator) of applicable safety, construction, or operating standards or regulations; or (B) the owner or operator fails or refuses to

provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities or to provide removal action upon order of a responsible official.

(3) Notwithstanding the limitations of paragraph (1) of this subsection or the defenses of subsection (b) of this section, all removal costs incurred by the United States Government or any State of local official or agency in connection with a discharge of oil from any Outer Continental Shelf facility or a vessel carrying oil as cargo from such a facility shall be borne by the owner or operator of such facility or vessel.

(4)(A) The President is authorized to establish by regulation, with respect to any class or category of onshore or offshore facility subject to paragraph (1)(D) or (E) of this subsection, a maximum limit of liability under this section of less than $100,000,000, but not less than $8,000,000, taking into account the size, storage capacity, oil throughput, proximity to sensitive areas, type of oil handled, history of discharges, and other factors relevant to risks posed by the class or category of facility.

(B) The President shall, by regulation, not less often than every three years, adjust the limits of liability specified in paragraph (1) of this subsection to reflect significant increases in the Consumer Price Index.

(d)(1) In the case of an injury to, destruction of, or loss of natural resources under subsection (a)(2)(C) of this section, liability shall be (A) to the United States Government for natural resources belonging to, managed by, controlled by, or appertaining to the United States, and (B) to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State, and (C) where subsection (e) of this section applies, to the government of a foreign country for natural resources belonging to, managed by, controlled by, or appertaining to such government. The President, or the authorized representative of any State or of the foreign government, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subsection (a)(2)(C) shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this Act for natural resource damages, including the

costs of damage assessment or restoration, rehabilitation, or acquisition for the same discharge and natural resource.

(2)(A) The President shall designate the Federal officials who shall act on behalf of the public as trustees for natural resources under this Act. Such officials shall assess damages for injury to, destruction of, or loss of natural resources for purposes of this Act for those resources under their trusteeship and may, upon request of and reimbursement from a State and at the Federal officials discretion, assess damages for those natural resources under the State's trusteeship.

(B) The Governor of each State shall designate State officials who may act on behalf of the public as trustee for natural resources under this Act and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the purposes of this Act for those natural resources under their trusteeship.

(C) Any determination or assessment of damages to natural resources for the purposes of this Act made by a Federal or State trustee in accordance with the regulations promulgated under section 301(c) of the Comprehensive Environmental Response, Compensation, and Liability Act shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this Act.

(e)(1) Except where title III of this Act applies, the recovery of removal costs and damages by (A) persons residing in a foreign country, (B) the government of a foreign country, or (C) any agency or political subdivision of a foreign country, under this Act, shall be exclusively in accordance with this subsection.

(2) A claimant under this subsection must demonstrate that the claimant has not been otherwise compensated for incurred removal costs or damages. Except with respect to paragraph (3)(D) of this subsection, a claimant under this subsection must demonstrate (A) that recovery is authorized by a treaty or executive agreement between the United States and the claimant's country, or (B) that the Secretary of State, in consultation with the Attorney General and other appropriate officials, has certified that the claimant's country provides a comparable remedy for United States claimants.

(3) Where a discharge, or substantial threat of a discharge of oil in or on the territorial sea, internal waters, or adjacent shoreline of a foreign country occurs, claims for removal costs and damages may be made under this subsection if the removal costs or damages resulted from a discharge of, or substantial threat of a discharge, of oil from—

(A) an Outer Continental Shelf facility or a deepwater port facility,

(B) a vessel occurring in the navigable waters of the United States,

(C) a vessel carrying oil as cargo between two ports subject to the jurisdiction of the United States; or

(D) a tanker that received oil at the terminal of the pipeline constructed under the Trans-Alaska Pipeline Authorization Act for transportation to a port in the United States, the discharge or threat having occurred prior to delivery to that port.

(4) This subsection shall apply only in the case of discharges of oil occurring after the enactment of this Act.

(f)(1) No. indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or onshore or offshore facility or from any person who may be liable for a discharge or threat of discharge under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this Act, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(g) The owner or operator of a vessel shall be liable in accordance with this section, the International Convention on Civil Liability for Oil Pollution Damage, 1984, and section 311 of the Clean Water Act, under maritime tort law, and as provided in section 106 of this Act, notwithstanding any provision of the Act of March 3, 1851 (46 U.S.C. 183), or the absence of any physical damage to the proprietary interest of the claimant.

USES OF FUND

SEC. 103. (a) The President shall use the money in the Fund for the following purposes:

(1) all removal costs or other costs of carrying out the purposes of subsections (c), (d), (i), and (l) of section 311 of the Clean Water Act, sections 5 and 7 of the Intervention on the High Seas Act, and section 18 of the Deepwater Port Act, with respect to discharges, or substantial threats of discharges, or oil (as the term "oil" is defined in each respective Act);

(2) payment of any claim for removal costs or damages—

(A) in excess of the amount for which the owner or operator of the vessel or onshore or offshore facility from which oil is discharged is liable under section 102 of this Act;

(B) where the source of the discharge of oil is not known or cannot be identified;

(C) in any case where the claim has not been satisfied in accordance with subsection (c) of this section; and

(D) subject to, but in excess of the combined compensation available under, the International Convention on Civil Liability for Oil Pollution Damage, 1984, and the International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage, 1984;

(3) payment of any claim for removal costs and damages that have resulted from the discharge, or substantial threat of a discharge, of oil from a foreign offshore unit;

(4)(A) payment of costs incurred by any State in responding to a discharge, or substantial threat of a discharge, of oil into the navigable waters or adjoining shorelines from a vessel, an onshore facility, an offshore facility, or a foreign offshore unit, as provided in subsection (d) of this section;

(B) reimbursement to any State for the payment of any claims for removal costs or damages payable under this Act which such State has paid with funds under the control of such State, including payment pursuant to a delegation under subsection (c) of this section;

(5) the costs of assessing both short-term and long-term injury to, destruction of, or loss of any natural resources resulting from a discharge of oil;

(6) the costs of Federal or State efforts in the restoration, rehabilitation, or replacement or acquiring the equivalent of any natural resources injured, destroyed, or lost as a result of any discharge of oil;

(7) payment of contributions to the International Fund as prescribed in section 305 of this Act;

(8) subject to such amounts as are provided in appropriation Acts, the costs of providing equipment and similar overhead, related to the purposes of this Act and section 311 of the Clean Water Act, and of establishing and maintaining damage assessment capability, for any Federal agency involved in strike forces, emergency task forces, or other response teams;

(9) the costs of a program to identify, investigate, and take enforcement and abatement action against discharges of oil, including the provisions of section 311(j)(1) (C) and (D) of the Clean Water Act; and

(10) all administrative and personnel costs of administering the Fund and this Act.

(b) The maximum amount which may be paid from the Fund with respect to any single discharge or incident, in combination with payment, if any, under the International

Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage, 1984, shall not exceed $500,000,000.

(c)(1) The President is authorized to promulgate regulations designating one or more Federal officials who may obligate money in the Fund in accordance with subsection (a) of this section or portions thereof. The President is also authorized to delegate authority to obligate money in the Fund or to settle claims to officials of a State with an adequate program operating under a cooperative agreement with the Federal Government.

(2) The President is authorized to delegate the administration of his duties and authorities under this Act to the heads of those Federal departments, agencies, and instrumentalities which the President determines appropriate.

(3)(A) The President shall promulgate, and may from time to time amend, regulations for the presentation, filing, processing, settlement, and adjudication of claims for removal costs or damages resulting from the discharge, or substantial threat of a discharge, of oil under this Act.

(B) Whenever the President receives information from any person alleging that a person has incurred removal costs or damages resulting from the discharge, or substantial threat of a discharge, of oil respecting which the owner or operator of a vessel or onshore or offshore facility is or may be liable

under section 102 of this Act, the President shall notify the owner, operator, or guarantor or such vessel or facility of that allegation. Such owner or operator or guarantor may, within five days after receiving the notification or presentation of any claim by a claimant, deny the allegation, or deny liability for removal costs and damages for any of the reasons set forth in subsection (b) of section 102 of this Act.

(C) The owner or operator of any vessel or onshore or offshore facility from which oil has been discharged shall provide notice to all potentially injured parties.

(D) No claims may be asserted against the Fund pursuant to subsection (a) unless such claim is presented in the first instance to the owner or operator or guarantor of the vessel or onshore or offshore facility from which oil has been discharged, if known to the claimant, and to any other person known to the claimant who may be liable under section 102. In any case where the claim has not been satisfied within sixty days of presentation in accordance with this subsection, the claimant may present the claim to the Fund for payment. No claim against the Fund may be approved or certified during the pendency of an action by the claimant in court to recover costs which are the subject of the claim.

(d) The Governor of each State, or any appropriate State official designated by the Governor, is authorized to obligate the Fund for the payment of removal costs in an

amount not to exceed $250,000 per discharge or substantial threat of discharge of oil, for the purpose of immediate response, subject only to the requirement that the President be notified within twenty-four hours of any such obligation under the authority of this sentence. In addition, the President shall enter into an agreement with the Governor of any interested State to provide a procedure by which the Governor or designated State official may undertake additional removal action or obligate the Fund for the additional payment of removal costs for response to a particular discharge or substantial threat of discharge, subject to such terms and conditions as may be agreed upon. Payments under subsection (a)(4)(A) of this section, other than as authorized by the first sentence of this subsection, shall be made in accordance with such agreements.

(e)(1) Payment of any claim by the Fund under this section shall be subject to the United States Government acquiring by subrogation all rights of the claimant to recover the removal costs or damages from the responsible party.

(2) Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for costs or damages shall be subrogated to all rights, claims, and causes of action for those costs and damages that the claimant has under this Act or under any other law.

(3) Upon request of the President, the Attorney General shall commence an action on behalf of the Fund to recover any compensation paid by the Fund to any claimant pursuant to this Act, and, without regard to any limitation of liability with respect to an owner or operator under section 102(c), all costs incurred by the Fund by reason of the claim, including interest (including prejudgment interest), administrative and adjudicative costs, and attorney's fees. Such an action may be commenced against any owner or operator or guarantor, or against any other person who is liable, pursuant to any law, to the compensated claimant or to the Fund, for the cost or damages for which the compensation was paid.

(f) The Fund shall not be available to pay any claim for costs or damages to the extent the discharge or the damages had been caused by the gross negligence or willful misconduct of that particular claimant.

(g) The Comptroller General shall provide an audit review team to audit all payments, obligations, reimbursements, or other uses of Fund, to assure that the Fund is being properly administered and that claims are being appropriately and expeditiously considered. The Comptroller General shall submit to the Congress an interim report one year after the establishment of the Fund. The Comptroller General shall thereafter provide such auditing of the Fund as is

appropriate. Each Federal agency shall cooperate with the Comptroller General in carrying out this subsection.

(h)(1) No claim may be presented under this section for recovery of removal costs after the date six years after the date of completion of all removal action.

(2) No claim may be presented under this section for recovery of damages unless the claim is presented within three years after the date of the discovery of the loss and its connection with the release in question, or in the case of damages under section 102(a)(2)(C), if later, the date on which final regulations are promulgated under section 301(c) of the Comprehensive Environmental Response, Compensation, and Liability Act.

(3) The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches eighteen years of age or the date on which a legal representative is duly appointed for the minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

(i) Where the President has paid out of the Fund for any removal costs or any costs specified under subsection (a) (6)

or (7), no other claim may be paid out of the Fund for the same costs.

(j) Except in a situation requiring action to avoid an irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources or similar need for emergency action, funds may not be used under this Act for the restoration, rehabilitation, or replacement or acquisition of the equivalent of any natural resources until a plan for the use of such funds for such purposes has been developed and adopted by affected Federal agencies and the Governor or Governors of any State having sustained damage to natural resources within its borders, belonging to, managed by or appertaining to such State, after adequate public notice and opportunity for hearing and consideration of all public comment.

FINANCIAL RESPONSIBILITY

SEC. 104. (a)(1) The owner or operator of any vessel over three hundred gross tons (except a non-self-propelled barge that does not carry oil as cargo or fuel), using any port or place in the United States or the navigable waters or any outer continental shelf facility or deepwater port facility, shall establish and maintain, in accordance with regulations promulgated by the President, evidence of financial responsibility sufficient to meet the maximum amount of liability to which the owner or operator could be subjected under section 102 of this Act in a case where the owner or operator would

be entitled to limit liability under that section. If the owner or operator owns or operates more than one vessel, evidence of financial responsibility need be established only to meet the maximum liability applicable to the largest of such vessels.

(2) The Secretary of the Treasury shall withhold or revoke the clearance required by section 4197 of the Revised Statutes of the United States of any vessel subject to this subsection that does not have the certification required under this subsection or the regulations issued hereunder.

(3) The Secretary of the department in which the Coast Guard is operating may (A) deny entry to any outer continental shelf facility, and deepwater port facility, or any port or place in the United States, or (B) detain at such a facility or port or place, any vessel that, upon request, does not produce the certification required under this subsection or the regulations issued hereunder.

(4) Any vessel subject to the requirements of this subsection which is found in the navigable waters without the necessary evidence of financial responsibility shall be subject to seizure by the United States of any oil carried as cargo.

(b) Each owner or operator with respect to an outer continental shelf facility, deepwater port facility, or other offshore facility, shall establish and maintain evidence of financial responsibility sufficient to meet the maximum amount of liability to which the owner or operator could be subjected

under section 102 of this Act in a case where the owner or operator would be entitled to limit liability under that section. Such evidence of financial responsibility shall be established according to regulations prescribed by the President.

(c) Financial responsibility under this section may be established by any one, or by any combination, of the following methods, which the President determines to be acceptable: evidence of insurance, surety bond, guarantee, letter of credit, qualification as a self-insurer, or other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States. In promulgating requirements under this section, the President is authorized to specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unacceptable, in establishing such evidence of financial responsibility in order to effectuate the purposes of this Act.

(d) Any claim for which liability may be established under section 102 of this Act may be asserted directly against any guarantor providing evidence of financial responsibility for an owner or operator liable under that section for costs and damages to which the claim pertains. In defending against such a claim, the guarantor may invoke all rights and defenses which would be available to the responsible party under section 102. The guarantor may also invoke the defense that the discharge was caused by the willful misconduct

of the owner or operator, but the guarantor may not invoke any other defense that might be available in proceedings brought by the owner or operator against the guarantor.

(e) The total liability of any guarantor in a direct action suit brought under this section shall be limited to the aggregate amount of the monetary limits of the policy of insurance, guarantee, surety bond, letter of credit, or similar instrument obtained from the guarantor by the person subject to liability under section 102 for the purpose of satisfying the requirement for evidence of financial responsibility. Nothing in this subsection shall be construed to limit any other State or Federal statutory, contractual, or common law liability of a guarantor, including, but not limited to, the liability of such guarantor for bad faith either in negotiation or in failing to negotiate the settlement of any claim. Nothing in this subsection shall be construed, interpreted, or applied to diminish the liability of any person under section 102 of this Act or other applicable law.

(f)(1) Any person who, after notice and an opportunity for a hearing, is found to have failed to comply with the requirements of this section or the regulations issued thereunder, or with a denial or detention order issued under subsection (a)(3) of this section, shall be liable to the United States for a civil penalty, not to exceed $25,000 per day of violation. The amount of the civil penalty shall be assessed by the

President by written notice. In determining the amount of the penalty, the President shall take into account the nature, circumstances, extent, and gravity of the violation, the degree of culpability, any history of prior violation, ability to pay, and such other matters as justice may require. The President may compromise, modify, or remit, with or without conditions, any civil penalty which is subject to imposition or which has been imposed under this paragraph. If any person fails to pay an assessed civil penalty after it has become final, the President may refer the matter to the Attorney General for collection.

(2) In addition to, or in lieu of, assessing a penalty under paragraph (1) of this subsection, the President may request the Attorney General to secure such relief as necessary to compel compliance with this section, including, but not limited to, a judicial order terminating operations. The district courts of the United States shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

(g) Any regulation respecting financial responsibility, which has been issued pursuant to any provision of law repealed or superseded by this Act, and which is in effect on the date immediately preceding the effective date of this Act, shall be deemed and construed to be a regulation issued pursuant to this section. Such a regulation shall remain in full

force and effect unless and until superseded by new regulations issued under this section.

LITIGATION, JURISDICTION AND VENUE

SEC. 105. (a) Review of any regulation promulgated under this Act may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Except as provided in subsections (a) and (c) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act (which shall be deemed to include actions under the International Convention on Civil Liability for Oil Pollution Damage, 1984, and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1984), without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the discharge or injury or damages occurred, or in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process. For the purposes of this section, the Fund and the

International Fund, established under article 2 of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1984, shall reside in the District of Columbia.

(c) A State trial court of competent jurisdiction over similar claims may consider claims under section 102 or State law and any final judgment of such court (when no longer subject to ordinary forms of review) shall be recognized, valid, and enforceable for all purposes of section 102, section 103, and title III of this Act.

(d) The provisions of subsections (a), (b), and (c) of this section shall not apply to any controversy or other matter resulting from the assessment or collection of any tax, as provided by title IV of this Act, or to the review of any regulation promulgated under the Internal Revenue Code of 1954.

(e) The President may prescribe the necessary regulations to carry out this Act and all obligations of the United States under the International Convention on Civil Liability for Oil Pollution Damage, 1984, and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1984.

(f) No provision of this Act shall be deemed or held to moot any litigation concerning any discharge of oil, or any

damages associated therewith, commenced prior to enactment of this Act.

(g)(1) Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 101(6)) under this Act, unless that action is commenced within three years after the date of the discovery of the loss and its connection with the release in question, or in the case of damages under section 102(a)(2)(C), if later, the date on which regulations are promulgated under section 301(c) of the Comprehensive Environmental Response, Compensation, and Liability Act.

(2) An initial action for recovery of removal costs referred to in section 102(a)(1) must be commenced within three years after completion of the removal action. In any such action described in this subsection, the court shall enter a declaratory judgment on liability for removal costs or damages that will be binding on any subsequent action or actions to recover further removal costs or damages. A subsequent action or actions under section 102 for further removal costs at the vessel or facility may be maintained at any time during the removal action, but must be commenced no later than three years after the date of completion of all removal action. Except as otherwise provided in this paragraph, an action may be commenced under section 102 for recovery of removal costs at any time after such costs have been incurred.

(3) No action for contribution for any removal costs or damages may be commenced more than three years after—

(A) the date of judgment in any action under this Act for recovery of such costs or damages, or

(B) the date of entry of a judicially approved settlement with respect to such costs or damages.

(4) No action based on rights subrogated pursuant to this Act by reason of payment of a claim may be commenced under this Act more than three years after the date of payment of such claim.

(5) The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches eighteen years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

STATE LAWS AND PROGRAMS

SEC. 106. (a) Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the discharge of oil or other pollution by oil within such State. Nothing in this Act shall affect or modify in any way the obligations or

liabilities of any person under other Federal or State law, including common law, with respect to discharges of oil.

(b) Nothing in this Act or in section 9507 of the Internal Revenue Act of 1954 shall in any way affect, or be construed to affect, the authority of any State—

(1) to establish, or to continue in effect, a fund any purpose of which is to pay for costs or damages arising out of, or directly resulting from, oil pollution or the substantial threat of oil pollution; or

(2) to require any person to contribute to such a fund.

(c) A State may enforce, on the navigable waters of such State, the requirements for evidence of financial responsibility applicable under section 104 of this Act.

(d) The President shall consult with the affected State or States on the appropriate removal action to be taken. Removal with respect to any discharge or incident shall be considered completed when so determined by the President and the Governor or Governors of the affected State or States.

(e) Nothing in this Act, the Act of March 3, 1851, as amended (46 U.S.C. 183 et seq.), or section 9507 of the Internal Revenue Act of 1954, shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof—

(1) to impose additional liability or additional requirements, or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law,

relating to the discharge, or substantial threat of a discharge, of oil.

TITLE II—CONFORMING AMENDMENTS

TRANS-ALASKA PIPELINE FUND

SEC. 201. (a) Section 204(b) of the Trans-Alaska Pipeline Authorization Act is amended, in the first sentence—

(1) by inserting after the words "any area" the words "in the State of Alaska";

(2) by inserting after the words "any activities" the words "related to the Trans-Alaska Oil Pipeline"; and

(3) by inserting at the end of the subsection the following new sentence: "This subsection shall not apply to removal costs covered by the Oil Spill Liability and Compensation Act of 1986.".

(b) Section 204(c) of the Trans-Alaska Pipeline Authorization Act is repealed. This repeal shall not affect the applicability of that section to claims arising before the enactment of this Act. The repeal of paragraph (4), (5), and (8) of that provision shall only become effective upon the payment by

the Board of Trustees of the Trans-Alaska Pipeline Liability Fund of all claims certified under subsection (c) of this section and the rebate of all remaining amounts under, and the completion of all actions required to carry out, such subsection.

(c)(1) Not later than two hundred and ten days after the date of enactment of this Act, the Board of Trustees of the Trans-Alaska Pipeline Liability Fund shall certify to the President the total amount of claims outstanding against that Fund as of the date of enactment of this Act. The amount of that Fund exceeding the total amount so certified shall be rebated directly, on a pro rata basis, to the owners of the oil at the time it was loaded on the vessel.

(2) After the settlement of all claims described in paragraph (1) and the completion of all actions, if any, by the Trans-Alaska Pipeline Liability Fund for recovery of amounts paid on such claims, the remaining amounts in that Fund shall be rebated directly, on a pro rata basis, to the owners of the oil at the time it was loaded on the vessel.

(3) Whenever a rebate is made on a pro rata basis to the owners of oil under paragraph (1) or (2) of this subsection, each owner's share of the rebate shall be an amount determined by dividing the amount contributed by that owner to the Trans-Alaska Pipeline Liability Fund by the total amount contributed by all such owners to that Fund.

(d) Trustees and former trustees of the Trans-Alaska Pipeline Liability Fund who were designated by the Secretary of the Interior shall not be subject to any liability incurred by that Fund or by the present and past officers and trustees of that Fund, other than liability for gross negligence or willful misconduct.

INTERVENTION ON THE HIGH SEAS ACT

SEC. 202. Section 17 of the Intervention on the High Seas Act is amended to read as follows:

"SEC. 17. The Fund established under the Oil Spill Liability and Compensation Act of 1986 shall be available to the Secretary for actions taken under sections 5 and 7 of this Act.".

CLEAN WATER ACT

SEC. 203. Section 311 of the Clean Water Act is amended as follows:

(a) Subparagraph (H) of paragraph (2) of subsection (c) amended by striking out "from the fund established under subsection (k) of this section for the reasonable costs incurred in such removal" and inserting in lieu thereof the following: "in the case of any discharges of oil from a vessel or facility, for the reasonable costs incurred in such removal from the Fund established under the Oil Spill Liability and Compensation Act of 1986".

(b) Subsection (d) is amended by striking out the last sentence.

(c)(1) Subsections (f), (g), and (i) of section 311 of the Clean Water Act shall not apply with respect to any discharge of oil resulting in removal costs for which liability is established under section 102 of this Act.

(2) Paragraphs (2) and (3) of subsection (f) are amended by striking out "under subsection (c) for the removal of such oil or substance by the United States Government" each place it appears and inserting in lieu thereof "under subsection (c) for the removal of such oil or substance by the United States Government and for payments made pursuant to section 103(a)(4)(A) of the Oil Pollution Liability and Compensation Act of 1986".

(d) Subsection (i) is amended by striking out "(1)" after "(i)" and striking out paragraphs (2) and (3).

(e) Subsection (k) is repealed. Any amounts remaining in the revolving fund established under that subsection shall be deposited in the Fund established under this Act. The Oil Spill Compensation Fund shall assume all liability incurred by revolving fund established under section 311(k) of the Clean Water Act.

(f) Subsection (1) is amended by striking out the second sentence.

(g) Subsection (p) is repealed.

(h) Section 311 is amended by adding at the end thereof the following new subsection:

"(s) The Oil Spill Compensation Fund, established under the Oil Pollution Liability and Compensation Act of 1986, shall be available to carry out subsections (c), (d), (i), and (l) as those subsections apply to discharges, or substantial threats of discharges, of oil. Any amounts received by the United States under this section shall be deposited in such Oil Spill Compensation Fund.".

DEEPWATER PORT ACT

SEC. 204. The Deepwater Port Act of 1974 is amended as follows:

(a) In section 4(c)(1) strike "section 18(l) of this Act;" and insert in lieu thereof "section 104 of the Oil Spill Liability and Compensation Act of 1986,".

(b) Subsections (b), (d), (e), (f), (g), (h), (i) (j), (l), (n), and paragraph (1) of subsection (m) of section 18 are deleted.

(c) Paragraph (3) of subsection (c) of section 18 is amended by striking "Deepwater Port Liability Fund established pursuant to subsection (f) of this section", and inserting in lieu thereof "fund established under the Oil Spill Liability and Compensation Act of 1986".

(d) Subsections (c), (k), and (m) of section 18 are redesignated (b), (c), and (d) respectively, and paragraphs (2), (3), and (4) of subsection (m) are redesignated (1), (2), and (3), respectively.

(e) Any amounts remaining in the Deepwater Port Liability Fund, established under section 18(f) of the Deepwa-

ter Port Act of 1974, shall be deposited in the Fund established under this Act. The Oil Spill Compensation Fund shall assume all liability incurred by the Deepwater Port Liability Fund.

OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS

SEC. 205. Title III of the Outer Continental Shelf Lands Act Amendments of 1978 is hereby repealed. Any amounts remaining in the Offshore Oil Pollution Compensation Fund established under section 302 of that title shall be deposited in the Fund established under this Act. The Oil Spill Compensation Fund shall assume all liability incurred by the Offshore Oil Pollution Compensation Fund.

TITLE III—IMPLEMENTATION OF INTERNATIONAL CONVENTIONS

DEFINITIONS

SEC. 301. For the purposes of this title—

(1) the terms "ship", "owner", "oil", "pollution damage", and "incident" shall have the meaning provided in article I of the Civil Liability Convention;

(2) the term "Civil Liability Convention" means the International Convention on Civil Liability for Oil Pollution Damage, 1984;

(3) the term "financial responsibility" shall have the same meaning as "financial security" under the Civil Liability Convention;

(4) the term "Fund Convention" means the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1984; and

(5) the term "International Fund" means the International Oil Pollution Compensation Fund, established under article 2 of the Fund Convention.

APPLICABILITY OF CONVENTIONS

SEC. 302. If the Civil Liability Convention and the Fund Convention are determined by the President to be consistent with the provisions of sections 102, 103, and 106 of this Act, during any period that the Civil Liability Convention and the Fund Convention are in force with respect to the United States, liability of an owner for pollution damage arising from an incident involving a ship shall be determined in accordance with the Civil Liability Convention and Fund Convention. During such a period, no claim with respect to pollution damage which is compensable under the International Fund may be made against the Oil Spill Compensation Fund under paragraph (2) (A), (B), or (C), or (4)(B) of section 103(a) of this Act.

RECOGNITION OF INTERNATIONAL FUND

SEC. 303. The International Fund is recognized under the laws of the United States as a legal person, and shall have the capacity to acquire and dispose of real and personal property, and to institute and be party to legal proceedings.

The Director of the International Fund is recognized as the legal representative of the International Fund. The Director shall be deemed to have appointed irrevocably the Secretary of State as the International Fund's agent for the service of process in any legal proceedings involving the International Fund within the United States. The International Fund and its assets shall be exempt from all direct taxation in the United States.

ACTION IN UNITED STATES COURTS

SEC. 304. (a) In any action brought in a court in the United States against the owner of a ship or its guarantor under the Civil Liability Convention, the plaintiff or defendant, as the case may be, shall serve a copy of the complaint and any subsequent pleading therein upon the International Fund at the same time the complaint or other pleading is served upon the opposing parties.

(b) The International Fund may intervene as a party as a matter of right in any action brought in a court in the United States against the owner of a ship or its guarantor under the Civil Liability Convention.

CONTRIBUTION TO INTERNATIONAL FUND

SEC. 305. (a) The amount of any contribution to the International Fund which is required to be made under article 10 of the Fund Convention by any person with respect to oil received in any port, terminal installation, or other installation located in the United States shall be paid to the Inter-

national Fund from the Oil Spill Compensation Fund, established under this Act.

(b) The President may, by regulation, require persons who are required to make contributions with respect to oil received in any port, terminal, installation, or other installations in the United States under article 10 of the Fund Convention to provide all information relating to that oil as may be necessary to carry out subsection (a) of this section and articles 10, 12, 13, 14, and 15 of the Fund Conventions.

RECOGNITION OF FOREIGN JUDGMENTS

SEC. 306. Any final judgment of a court of any country which is a party to the Civil Liability Convention or to the Fund Convention in an action for compensation under either convention shall be recognized by any court of the United States having jurisdiction under this Act, when that judgment has become enforceable in that country and is no longer subject to ordinary form of review, except where—

(1) the judgment was obtained by fraud, or

(2) the defendant was not given reasonable notice and a fair opportunity to present its case.

FINANCIAL RESPONSIBILITY

SEC. 307. (a) The owner of each ship which is documented under the laws of the United States which is subject to the Civil Liability Convention shall establish and maintain, in accordance with regulations promulgated by the President,

evidence of financial responsibility as required in Article VII of the Civil Liability Convention.

(b) The owner of each ship (other than a ship to which subsection (a) applies or a ship which is a public vessel), which is subject to the Civil Liability Convention and which enters or leaves a port or terminal in the United States or uses an outer continental shelf facility or deepwater port facility, shall establish and maintain, in accordance with regulations promulgated by the President, evidence of financial responsibility as required in article VII of the Civil Liability Convention. Any ship which has on board a valid certificate issued in accordance with article VII of the Civil Liability Convention shall be considered as having met the requirements of this subsection. Any ship carrying only oil as cargo, fuel, or residue, which has on board a valid certificate issued in accordance with article VII of the Civil Liability Convention shall be considered as having met the requirements of section 104 of this Act.

(c) The President is authorized to issue any certificate of financial responsibility which the United States may issue under the Civil Liability Convention.

(d) The Secretary of the Treasury shall withhold or revoke the clearance required by section 4197 of the Revised Statutes of the United States of any ship which does not have a certificate demonstrating compliance with this section.

(e) The Secretary of the department in which the Coast Guard is operating may (1) deny entry to any facility or to any port or place in the United States, or (2) detain at the facility or port or place in the United States, any ship subject to this section which, upon request, does not produce the certificate demonstrating compliance with this section or regulations issued hereunder.

(f) Any person who, after notice and an opportunity for a hearing, is found to have violated this section, any regulation issued thereunder, or any denial or detention order issued under subsection (e) of this section shall be liable to the United States for a civil penalty, not to exceed $25,000 per day of violation. The amount of the civil penalty shall be assessed by the President in accordance with the procedures set forth in section 104(f) of this Act.

(g) The United States waives all defenses based on its status as a sovereign State with respect to any controversy arising under the Civil Liability Convention or the Fund Convention relating to any ship owned by the United States and used for commercial purposes.

OIL POLLUTION LIABILITY AND COMPENSATION ACT OF 1986

FRIDAY, SEPTEMBER 12, 1986

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, D.C.

The committee met, pursuant to recess, at 10:07 a.m., in room 406, Dirksen Senate Office Building, Hon. Robert T. Stafford (chairman of the committee) presiding.

Present: Senators Stafford, Chafee, Mitchell, Bentsen, Durenberger, and Lautenberg.

OPENING STATEMENT OF HON. ROBERT T. STAFFORD, U.S. SENATOR FROM THE STATE OF VERMONT

Senator STAFFORD. The committee will come to order. I will ask our guests to be seated.

This is a continuation of hearings with respect to oil spills. There have been two previous hearings; the latest one occurred 2 days ago. I expect some of my colleagues on the committee will be here, but we'll proceed in any event.

The first on this panel will be Mr. Frank Iarossi, president, Exxon Shipping Co., representing the American Petroleum Institute. The next witness will be Mr. Marshall Ballard, general manager, Penrod Drilling Co., and the final witness will be Mr. John Prokop, who is president and counsel, Independent Liquid Terminals Association.

Gentlemen, it would be our intent to hear all three of you before we go to questions, and to go in the order in which I read your names. So, Mr. Iarossi, I guess you're at bat.

STATEMENT OF FRANK IAROSSI, PRESIDENT, EXXON SHIPPING CO., REPRESENTING THE AMERICAN PETROLEUM INSTITUTE, ACCOMPANIED BY PETER GHEE, SENIOR COUNSEL, MOBIL OIL CORP.

Mr. IAROSSI. Thank you, Mr. Chairman, and good morning.

Senator STAFFORD. Good morning.

Mr. IAROSSI. I am here this morning as chairman of API's tanker committee. With me to help address your questions is Mr. Peter Ghee, senior counsel with Mobil Oil Corp.

We appreciate the opportunity to discuss the API membership's views on Senate bill 2340, other House and Senate versions of this bill, and on the general subject of oil spill legislation. Copies of

API's written comments have been delivered to the committee, and we request that they be made a part of this record.

The committee's invitation asked that we address whether a new Federal program is desirable; and, if so, why. We believe that Federal legislation, well-crafted to satisfy the essential interests of all parties associated with this subject, is a worthy goal. Historically, API has supported the concept of comprehensive domestic oil spill legislation in the belief that a single body of law and a single source of readily available funds could result in quicker, fairer, and more uniform settlement of claims resulting from oil spills.

For at least the last 8 years, interested parties have worked on this issue to develop a consensus which would satisfy the essential objectives of all parties. In the House bill, H.R. 1232, we have come close to establishing that difficult consensus. However, the Senate proposals that we have been asked to address today seem to move us further away from this necessary consensus, especially with respect to provisions considered essential by our membership. I will concentrate my remarks on three provisions which we consider as fundamental principles.

First, all oil spills into navigable waters should be covered by Federal legislation to provide a single body of law for the settlement of damage claims resulting from oil spills and a single source of readily available funds of sufficient magnitude to cover removal costs, as well as to satisfy claims judged to be legitimate. The variance among existing State laws can represent significant legal complexity, especially when an oil spill impacts more than one State. Creating Federal legislation which does not clearly supersede State jurisdiction with regard to damage claims would add to that complexity, potentially complicating final settlement of claims rather than facilitating such settlement.

The Federal fund created by new legislation should complement, rather than duplicate, State funds. This does not imply elimination of present State funds or opposition to the creation of new ones. Many State funds meet needs other than covered by the proposed Federal legislation; therefore, it would be reasonable for State funds to continue to exist for such purposes as cleanup of land spills, purchase and maintenance of State cleanup equipment, and the training of State personnel. However, the Federal funds should be the sole source available to cover marine cleanup costs or to immediately replenish State funds used for oil spill cleanup. The Federal fund should also be the single source available to satisfy legitimate damage claims arising from marine spills.

The oil industry and the American consumer should not be burdened with a Federal fund as well as the multitude of State funds, all intended to cover the same purpose.

A second essential element is the ability of an owner or operator to limit the liability associated with a potential spill unless that spill was caused by willful misconduct or gross negligence. A limit on liability which is set high enough to cover a realistic level of damage claims, while at the same time providing a basis for insurability, is in the interests of all parties. Unlimited liability is meaningless if the owner or the operator of a vessel or facility cannot obtain the insurance or does not have the financial assets to satisfy all potential claims. Unlimited liability would certainly not satisfy

the interests of claimants if it prevented owners and operators from acquiring the necessary and sufficient insurance coverage.

The third essential, in our view, relates to the size of the fund and, more specifically, to the principle of capping the fund at a level which will cover calls which could realistically be made on the fund. An uncapped fund, or a fund with an unrealistically high cap, would represent an unjustified drain on the capital resources of the industry and its consumers. An unrealistically low cap, on the other hand, would delay the time required for claimants to recover legitimate damages.

What is essential is acceptance of the principle of a cap, or limitation, on the amount of funds to be accumulated.

With regard to funding, we believe the three existing Federal funds should be phased out as the larger, more comprehensive fund builds up. The moneys in the Offshore Oil Fund and the Deepwater Port Fund should be credited to the original contributors. Since the TAPAA fund greatly exceeds the contributions to the new fund which would be required from the TAPAA participants, these funds should be rebated to the original contributors.

We understand the concerns expressed by members of this committee regarding preemption of State laws involving the settlement of damage claims, and limits to liability. However, we believe that equitable and prompt resolution of claims would be greatly enhanced by a single body of law and that reasonable limits on liability would result in more certain insurability of owners and operators. We believe that Federal legislation superseding State laws regarding the settlement of damage claims, reasonable limits on the liability of owners and operators, and a realistic cap on the size of the fund are essential elements of any consensus. And taken together, they represent a reasonable quid pro quo for the establishment and maintenance of a substantial domestic oil spill fund.

While support for this position is not unanimous, we are gratified to see that the administration, the House, and a number of environmental interests agree with the oil and tanker and barge industries on this point.

Coming back to your original question, is a new Federal program desirable, API supports such a program provided the essential interests of affected parties are adequately addressed in the development of a satisfactory consensus. From API's perspective, if a new Federal initiative does not satisfy the above principles, then perhaps we would all be better served by maintaining the current status; that is, continue without a new Federal program.

API's written testimony contains specific comments and suggested improvements regarding Senate bill 2340. Because our membership has not had the opportunity to fully evaluate the bill introduced earlier this week by Senator Mitchell, API may wish to submit additional written testimony in the near future.

Thank you for your attention.

Senator STAFFORD. Thank you very much, Mr. Iarossi. We will place your full, detailed statement in the record. I assume that would be your wish, that it be made a part of the record.

Mr. IAROSSI. Yes, sir.

Senator STAFFORD. And we would be pleased to get any additional comments that you might wish to offer us. I would recommend the sooner the better.

Mr. IAROSSI. Yes. We understand that, Mr. Chairman.

Senator STAFFORD. All right. Thank you.

[Additional comments follow:]

American Petroleum Institute
1220 L Street, Northwest
Washington, D.C. 20005
202-682-8100

Charles J. DiBona
President

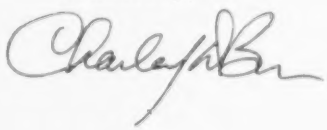
September 29, 1986

The Honorable
Robert T. Stafford
Chairman, Senate Environment
and Public Works Committee
United States Senate
Washington, D.C. 20570

Dear Senator Stafford:

The American Petroleum Institute greatly appreciates the opportunity to testify before your committee on September 12, 1986 on the subject of comprehensive oil spill liability and compensation legislation. API's representative, Frank Iarossi, emphasized our position on the bill you sponsored, S.2340, which was the subject of the hearing. Most of his oral comments and the testimony we previously submitted on this subject are equally applicable to Senator Mitchell's bill, S.2799, which was introduced a few days before the hearing. We have also enclosed a statement on S.2799, and request that it be accepted for the record.

Sincerely,



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API Position on S.2799, (Comprehensive Oil Pollution Liability and Compensation Legislation)

API opposes S.2799 in its present form, for the following principal reasons:

o The bill would not pre-empt state funds, and also permits any state to impose any liability limit and standard of liability for incidents occurring within the state.

API believes all oil spills into navigable waters should be covered by federal legislation, to provide a single body of law for claims settlement, and a single source of readily available funds to pay removal costs and claims judged to be legitimate. Varying state laws complicate victim compensation when a spill crosses state boundaries. Duplicative and overlapping state funds established for this purpose are wasteful and an unnecessary burden on the taxpayer, and should be pre-empted to the extent that they would cover the same purposes of a federal trust fund.

The ability of an owner or operator to limit the liability associated with a spill is essential, unless the spill is caused by willful misconduct or gross negligence. Realistic limits of liability should be set high enough in federal law to cover the range of foreseeable claims, and would provide the basis for owner insurability. This is an asset for claimants because unlimited liability is meaningless if owners cannot obtain insurance, or do not have the financial assets to satisfy all potential claims.

o S.2799 would allow state courts to make awards drawn from assets in a federal trust fund.

API believes that it is inadvisable for one jurisdiction or political entity to access the funds of another. Additionally, uniformity of claim awards, and therefore equitable treatment for claimants, would be assured if one federal fund administrator reviews and authorizes awards. This would protect claimants as well as those paying into the fund.

o S.2799 proposes a $350 million federal fund with a $500 million per incident maximum payment.

In our view, the federal fund from which cleanup costs and damage claims would be payed should be capped at a realistic level, based on historical claims experience. An uncapped fund, or one with an unrealistically high cap, is an unjustified drain on the industry and U.S. consumers. No oil spill in the U.S. has so far required any expenditures from existing trust funds for settling cleanup or damage claims. In view of this favorable record, industry believes fund collections should be capped at $200 to $250 million, with a similar maximum per incident payment. Those who have paid into the existing OCS and DWP funds should be given credit for their contributions, but S.2799 does not allow this. There is also no provision for crediting to the trust fund any interest earned by investment of the federal fund.

o S.2799 permits unlimited liability for "violation (within the privity or knowledge of the owner or operator) of applicable safety, construction or operating standards or regulations."

API believes the right to limit liability should only be lost when there is willful misconduct or gross negligence. There are hundreds of federal, state and industry technical safety and operating standards, one of which could always be found to have been violated. Unlimited liability would be a grossly disproportionate sanction for a technical violation.

Senator STAFFORD. The next witness will be Mr. Marshall Ballard, general manager, Penrod Drilling Co., to be followed by Mr. John Prokop. I will say to my colleagues, we have not put in opening statements in order to get this thing going. If you have them, we will pause for them at the end of the witnesses, before questions. And we would expect to complete hearing the witnesses before we go to questions.

Mr. Ballard.

STATEMENT OF MARSHALL BALLARD, GENERAL MANAGER, PENROD DRILLING CO., DALLAS, TX

Mr. BALLARD. Thank you, Mr. Chairman, and members of the committee. I am Marshall Ballard, general manager, Penrod Drilling Co., Dallas, TX. Penrod is one of the world's largest offshore contractors; we currently operate or own 38 rigs, working in and offshore of the United States.

I'm appearing on behalf of the International Association of Drilling Contractors, which is a trade association representing over 1,300 members engaged in all aspects of drilling for and exploration of hydrocarbons. These members come from all over the world. We appreciate the opportunity to appear before you and give our comments, and we would also ask that our written comments submitted to you earlier be made a part of the record.

Senator STAFFORD. Without objection, the full statement will appear in the record.

Mr. BALLARD. The IADC has testified before Congress several times over the years to discuss needed amendments to title III of the Outer Continental Shelf Lands Act Amendments of 1978, which establish the liability and compensation scheme for damages resulting from oil spills on the Outer Continental Shelf. The principal we've voiced in the past have, in large measure, been considered and addressed by the House of Representatives and are incorporated in present pending legislation, H.R. 2005, the oil spill title. The overall purpose of this title, derived for the most part from legislation passed last year by the House as H.R. 1232, was threefold. That was to clarify the liability and penalty provisions in title III; to raise the liability limits for certain parties; and to apportion the liability among the parties operating on the OCS to reflect more closely the prevailing industry practice prior to the enactment of title III. Certain technical amendments clarifying the liability provisions of title III would facilitate the growth of a marine insurance market for OCS-related activities by removing the ambiguities that may affect the potential liability of insurers and guarantors. Because of the perception in the insurance industry that under certain circumstances insurers and guarantors are subject to unlimited liability for oil spill cleanup and removal costs, there currently exists no—or virtually no—insurance market to cover such risks.

The Coast Guard, over the years—and particularly in its annual report to Congress on the fund—has told Congress about the need for this.

We strongly support enactment of comprehensive oil spill legislation. Prior to the enactment of title III, the offshore industry practice generally was to include indemnity provisions in contracts be-

tween drilling contractors and OCS leaseholders. And basically, what these encompassed was that the holder of the lease agreed to indemnify the contractor, the service company, from spills emanating from below the surface of the water—really, the well bore—and, in turn, the service company's drilling contractors agreed to indemnify the leaseholder from any spills that came from the rig itself.

This, basically, recognized the relative economic relationships between the two parties. We drill out there, normally, for a fixed daily rate. We get none of the income or derive any of the benefits from any oil or gas or any other hydrocarbons that may be found out there. And by the same token, the operator or the leaseholder, which does get this, agrees to accept the greater limit of liability. Basically, most drilling companies, if not all of them, just basically can't afford to be exposed to this type of unlimited liability.

It was the common practice, as well—a number of leaseholders do require the drilling company, in the event that they are grossly or solely negligent, to assume some liability for the escape of hydrocarbons from the well bore; but always there is a cap on this which the drilling contractor can afford and stand. We, personally, have also had operators tell us that if they thought we had the propensity to cause the well to blow out, they probably wouldn't be using us and talking to us in the first place. But anyway, this was done through the process of contract negotiation between the drilling company and the leaseholder.

We basically—and these are in the written comments that we had—there are several reasons why the situation as it is now puts an undue burden on us. It's in the written comments; I don't see any reason to go through those one by one.

We also point out in our written comments basically why we feel that Senate bill 2340 could be improved or could be amended to address our concerns in several important ways which, again, are set forth in the written comments which I think you can go through and read.

Mr. Chairman and the committee, there has long been a general consensus among drilling contractors, oil companies, and environmentalists that a comprehensive oil pollution, liability, and compensation regimen is an idea that has been too long in coming. Absent legislation, insurance costs for the drilling industry are likely to mount in the face of uncertainty as to limits of liability. I might touch on that specifically, which is really another one of our important points.

In addition to there being some question about—or a grave question about—our ability to apportion these liabilities between the leaseholder and the drilling company, the alternative would be for the service drilling companies to obtain insurance. However, because of the insurance companies' perception of the unlimited liability if they are an insurer or guarantor, there is really then no market. So we haven't had even the alternative of going to the insurance market to cover this liability because the insurance industry, at least, takes the position that the way title III is currently written, they're not sure that their liability is limited by the face amount of their policy, which for them is untenable. But whether

they are right or wrong in that interpretation, basically, insurance for this is not available. They won't write the policy.

Absent legislation, insurance costs for the drilling industry are likely to mount in the face of uncertainty as to the limits of liability. Actually, as I told you before, you really can't even get the insurance. The Coast Guard also has continued to ask for congressional clarification of its mandate to administer title III, the OCS Land Act Amendments of 1978. We urge expeditious Senate action to resolve this perennial issue.

Thank you very much.

Senator STAFFORD. Thank you very much, Mr. Ballard.

The final witness of the panel will be Mr. John Prokop, president and counsel, Independent Liquid Terminals Association.

STATEMENT OF JOHN PROKOP, PRESIDENT AND COUNSEL, INDEPENDENT LIQUID TERMINALS ASSOCIATION, WASHINGTON, DC

Mr. PROKOP. Thank you, Mr. Chairman and committee members. I am pleased to be here today to comment on this important legislation, S. 2340, S. 2799, and the several versions of the House bill.

I represent the Independent Liquid Terminals Association, which represents 250 waterside bulk liquid terminals located in 38 States. These range from small, family-sized companies to larger, medium-sized corporations. ILTA members do not own the products stored at their tank farms, but they lease their storage tanks to bulk liquid commodity owners and provide product transfer and other terminaling services for a fee.

ILTA, along with many other organizations, supports the need for a uniform, comprehensive oil spill law.

ILTA has a number of concerns which, more and more, have become insurance driven. ILTA is concerned that if a new oil spill liability compensation regime is enacted into law, certain disruptions in oil spill property and casualty insurance will be repeated. Among these is the concern that new oil spill liability provisions—either those which cover damages the insurance industry has deemed speculative, such as environmental restoration, or those which increase or widen the financial liability of persons subject to the law—will cause the property and casualty insurance industry to again leave the marketplace. This happened in 1972, after the Congress enacted the Federal Water Pollution Control Act. Underwriters deleted oil pollution coverage from onshore facility insurance policies as they came due for renewal. The coverage was not available for several years afterward.

Of course, the Congress could enact a new comprehensive oil spill liability law, but the Congress should understand that for companies who have not already lost their spill coverage because of the current insurance crisis, the 1972 problem could recur.

Although the bills before the committee exclude mandatory financial responsibility for onshore facilities, we have noted that at least one other organization has strongly suggested that such a provision be amended to any bill the committee might approve. In the past, it has even been suggested that there be a single level of $50 million mandatory financial responsibility for all onshore facilities, regardless of the size or dollar value of a facility, the volume of oil

it handles, the availability of such insurance, or the affordability of such insurance if it actually became available.

We appreciate the committee's recognition of this important concern. The insurance market is unpredictable and erratic, and without warning it can and has eliminated oil spill coverage from policies or made it unaffordable. We also appreciate that you understand that most likely, the sudden, massive demand for such coverage that thousands of companies would place on the insurance industry's underwriting capacity could not be met by the insurance market. Of major concern is that mandatory financial responsibility would constitute a license to operate; and when such coverage is unavailable or unaffordable, businesses without the coverage would have to close down.

Another area which we mention in our written statement is that of the International Oil Pollution Spill Liability and Compensation Fund Conventions. We simply note that if the United States ratifies the conventions and becomes a party to them, and if the 1984 protocols amending the conventions are adopted, that the contribution the United States would have to make to the international fund would be almost 30 percent of the total fund. The United States would be the largest contributor to the fund.

Data and a map of "Main World Oil Movements by Sea in 1982," from a study completed for the U.S. Coast Guard, indicate that the majority of ocean spills do not occur in U.S. waters. Thus, the fees the U.S. consumer would pay into the fund would be spent to clean up ocean oil spills elsewhere in the world. The U.S. payment would be seriously out of balance with the benefit it would receive.

Before endorsing these international conventions, the Senate should demand an accurate accounting of exactly what they would cost the U.S. oil consumer and taxpayer. We must ask, wouldn't just a U.S. fund alone better serve the needs of our Nation?

The final matter is preemption of State oil spill laws. For effective enforcement of a comprehensive national oil spill law, State participation is needed. Federal and State government should cooperate in enforcing the same basic law. Deviations in State law should be made only where proven necessary.

The theory is that we can devise a Federal oil spill liability statute that can be adopted by the States in the same way they have adopted RCRA, [the Federal Resource Conservation and Recovery Act] dealing with hazardous waste control.

Enforcement would be easier. Compliance would be easier. Victims' rights and compensation would be the same from State to State. It would eliminate the problem that can be created now when a spill occurs on U.S. navigable water adjacent to the shores of several States. The Federal oil spill law would apply and one or more of the 24 different State oil spill laws might also apply.

This is also an insurance-driven concern. Insurance companies are leery of the possibility of having to cover multiple legal and financial liability for the same discharge under the same policy. They are concerned this multiple exposure under the same policy could exceed the financial limit of the policy.

In conclusion, I had heard that it was oil that made the world go around, but now it appears to be insurance. Any legal liability scheme the Congress adopts must also encourage the property and

casualty underwriters and reinsurers to provide consistently available, affordable oil spill coverage, or our legislative efforts to protect the environment will be self-defeating.

I thank you and I appreciate the opportunity afforded me to comment here today.

Senator STAFFORD. I thank you all. We appreciate your being here and the brevity with which you have made your statements.

Understanding that Senator Mitchell has to leave shortly, and knowing of his intense interest in this legislation, the Chair is going to recognize Senator Mitchell first.

I would suggest, gentlemen, we agree on 10 minutes for the first round.

Senator CHAFEE. Mr. Chairman, I know Senator Mitchell only has a limited time and as far as I am concerned, he can go right up until he has to leave. I understand he's only got 12 or 13 minutes.

Senator MITCHELL. I'll take less than 10 minutes. I do appreciate your courtesy, Mr. Chairman.

I'd like to ask each witness to respond to the first question. Should the United States ratify the international protocols? Mr. Iarossi?

Mr. IAROSSI. Well, Senator, as we testified with the Foreign Relations Committee, the API believes that in the broad context of coverage there is a place for an international agreement. The position of API relative to the specific protocols is one of questioning whether that particular agreement satisfies the interests of the United States.

Senator MITCHELL. Is that a no?

Mr. IAROSSI. It could be taken as that, yes. We have problems with specific parts of the protocols.

Senator MITCHELL. What is the Exxon company's position?

Mr. IAROSSI. We are neither supportive nor opposed.

Senator MITCHELL. You have no position on the protocols?

Mr. IAROSSI. That's right.

Senator MITCHELL. And the API, as you are now saying——

Mr. IAROSSI. There are members within API who are strongly opposed.

Senator MITCHELL. Are there any members who are strongly in favor?

Mr. IAROSSI. One, that I know of.

Senator MITCHELL. One? OK.

Mr. Ballard?

Mr. BALLARD. Senator, the IADC has no position on the protocols, nor does Penrod.

Senator MITCHELL. Thank you.

Mr. Prokop, I gather you're against them?

Mr. PROKOP. Well, I will say that I think it's a good idea, but I do have that reservation that I expressed about the cost to the U.S. oil consumer. If that were modified, I don't think I would have a problem with it—although there may be some other problems.

Senator MITCHELL. Well, if that were modified, that's no problem. I mean, that's the heart of it. So may I take it that you would be opposed to ratification of the protocols in their present form?

Mr. PROKOP. Yes.

Senator MITCHELL. All right.

You gentlemen have all expressed concern about the problem of State laws existing side by side with the Federal law. As you know, there currently exists a series of Federal laws—and some State laws, some of which have unlimited liability. Are any of you able to present to this committee evidence that shipping of oil is affected now by the existence of different State laws? Is there less shipping to States with oil spill regimes than to States without oil spill regimes? Is there less shipping to States with unlimited liability than there is to States with limited liability? Or is, in fact, the volume and direction of business now dictated by economic concerns, unrelated to the existence or nonexistence of these laws? Mr. Iarossi?

Mr. IAROSSI. I would say, Senator, that there isn't any strong evidence that says whether a State has an unlimited liability or not influences——

Senator MITCHELL. Well, is there any evidence at all?

Mr. IAROSSI. Not that I know of.

Senator MITCHELL. There's no evidence, in your mind?

Mr. IAROSSI. No.

Senator MITCHELL. OK.

Mr. Ballard?

Mr. BALLARD. Senator, not being in that business at all, we wouldn't know. We wouldn't have any position or information on that.

Senator MITCHELL. All right.

Mr. Prokop.

Mr. PROKOP. My opinion is that it's totally dictated by economic demands, that the oil goes where it's needed.

Senator MITCHELL. That being the case, then, what basis is there to predict that there would be any change in that pattern based upon the change in the law? If there is no evidence to suggest that these have any influence whatsoever on shipment of oil now, what evidence is there to support predictions that not changing that circumstance will create the dire results that have been predicted?

Go ahead, Mr. Prokop.

Mr. PROKOP. Well, for a small facility, my concern is for what might happen after an incident would occur. For example, if a law imposes unlimited financial liability, I don't think that a small business could cover such unlimited liability—if, for some strange reason, a series of incidents occurred and the spill had a large damage impact. It would make no difference whether the liability had a limit of $100 million or $500 million. You could only sue for the assets of a small facility.

Now, with the larger facility, I think that's a different story, and I think that's where the concern lies.

Senator MITCHELL. But that's a question of whether or not liability is limited, not whether or not a State program can coexist with a Federal program.

Mr. PROKOP. I think a State program can coexist with the Federal program. I have no problem with that. I do have a problem with reading these 26 different State laws, and they all have a unique approach to, really, reaching the same goal. All I'm saying is that we should have the capability to make them more similar, like we did with RCRA, and we could all understand a bit better.

Senator MITCHELL. That's the American way, though, Mr. Prokop. When President Reagan goes on television and says, I want to get the Government out of your business and off of your backs, and the Federal Government is the source of the problems in this country, most Americans—you and I included—probably nod with agreement. We have a republican form of government in which we have one Federal and 50 State sovereign governments; and in a variety of areas, States regulate economic activity. And they're different, including insurance. So it may be an inconvenience to some, but as a society, we have concluded that there are benefits to it.

I just say that you mentioned a couple of environmental laws. The rationale that Mr. Iarossi expressed is that, well, an oil spill might get into waters that affect more than one State. Well, of course, the same waters may be polluted by other forms of pollution under the Clean Water Act, and we have separate State laws under the Clean Water Act. Air may be polluted in a way that transcends boundaries and includes more than one State; we have separate State laws in the Clean Air Act. Do you favor repeal of the Clean Air Act and Clean Water Act, that permit States to operate their own programs?

Mr. PROKOP. Oh, no. That's what I'm saying. I think that you need to use that same approach.

Senator MITCHELL. Mr. Iarossi?

Mr. IAROSSI. No, we certainly don't suggest that.

Senator MITCHELL. You don't.

Mr. IAROSSI. We do believe that with the Clean Air Act, you do have different circumstances. The thing we're dealing with here—we're talking about multiple jurisdictions dealing with the settlement of what could be very large claims, so it is a little different as far as the jurisdictional overlap and the differences in State and Federal requirements.

Senator MITCHELL. Well, I thank you, gentlemen.

Thank you, Mr. Chairman, for your courtesy.

I do thank all of you for very informative testimony that will contribute to the committee's understanding of this issue, and I hope we're able to work something out that will be acceptable to everyone. Thank you very much.

Senator STAFFORD. Thank you, Senator Mitchell.

I will say to my colleagues that we passed up opening statements in order to get the witnesses to the table and to make their presentations. The chair would break here, if there are opening statements. Senator Bentsen, did you have any opening statement?

Senator BENTSEN. No, Mr. Chairman. Thank you very much.

Senator STAFFORD. All right.

Senator Lautenberg.

Senator LAUTENBERG. Briefly, Mr. Chairman, and I ask not only my colleagues' patience, but the witnesses as well.

OPENING STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. I will run through this very briefly because there is a current issue affecting New Jersey and its sur-

rounding States in the south that has everybody very much alarmed.

I come to today's hearing with a current and shocking reminder of the terrible threats posed by oil spills. Wednesday, the day after I joined with Senator Mitchell and Chairman Stafford and other committee members in introducing comprehensive oil spill legislation—this is the bill, S. 2799—we in the Delaware River region found ourselves facing yet another major oil spill. At this very moment, some 300,000 gallons of crude oil lie in the river, once again threatening New Jersey, Pennsylvania, and Delaware. Once again an oil tanker ran aground, spilling hazardous cargo into our river. It's the third such spill in just 12 months, and the third time New Jersey and the region's citizens, waterways, beaches, and wildlife are being exposed to the severe environmental threats of oil-spills.

Later today I am going to fly up to inspect the spill site to see firsthand how the cleanup efforts are proceeding. When I do, I'm determined to bring that picture back to New Jersey and other affected States, and I am determined to let them know that we, here in the Congress, are doing whatever we can to see that these spills will stop. At least we're going to try, and the measure of that determination is going to be our commitment to passing S. 2799, the bill that's before our committee today.

This is a bill that not only establishes a comprehensive liability and funding system, but also allows fund money to be used for the costs of measures to identify, to investigate, and to take enforcement and abatement action against spills. This means fund money is provided not just for compensation, but also for the prevention of damage. And I'm sure that those of you at the table who are appearing here today would certainly join in that objective, even if you disagree with the approach that we're taking. The 300,000 gallons of crude oil now in the Delaware, and in light of other recent spills there—the bill's investigative and preventive measures are very important. We've got to get a better handle on why spills are happening and what can be done to prevent them.

Coast Guard statistics show an increase in the frequency and the types of mechanical problems that led to two previous spills in the Delaware. There are suggestions that a cause of this trend is declining oil shipments to America, less cargo to carry, surplus of available ships. Tanker operators, I think, could be offering low rates to keep their vessels moving. Low rates, some suggest, mean ship owners are trying to cut their own expenses and may be doing so by reducing safety measures, maintenance, and emphasis on qualified crew.

If so, these are disturbing trends and suggestions, and we've got to act to understand them better and to stop them if that's taking place, and to ensure adequate compensation when spills do occur. The legislation introduced on Tuesday of this week, S. 2799, I think is a significant step toward achieving these goals, and I am pledged to do all that I can to work for its passage.

Notwithstanding that statement I am, as Senator Mitchell said, interested in what you have to say. You're another part of the equation, a significant part, and I look forward to the opportunity to talk to you about a few things of concern.

Thanks, Mr. Chairman.

Senator STAFFORD. Thank you, Senator Lautenberg.

Gentlemen, I may have one or two questions. Let me start with this. You have all asked for preemption of States 'rights. I gather what you want is some greater certainty as to your possible liabilities. So I first ask you, do you think preemption is the only way—preemption of States 'rights, to achieve certainty—is this an either/or case, in your judgment?

Mr. Prokop.

Mr. PROKOP. No, I didn't ask for preemption, sir. I think that what we need to do is to make the laws more similar and to define the areas of responsibility better. But I really understand, after talking to many people in State governments, the need for the State government to act if it feels that the Federal Government is not responding the way it would like it to, to protect the people in its jurisdiction and its environment.

My only concern is, again, these laws are so dissimilar. The State law of Maine, Senator Mitchell's state, places the responsibility on the terminal for spill from a vessel coming to the terminal. The State of New Hampshire does not have that in its law. In the Portsmouth area—if you had a spill there,—you would have two different State laws and a Federal law applying. I think it would make the whole situation a lot easier if they were all similar so that we could determine what the liability was.

It would also probably encourage the insurance companies a little bit more to come back into the market.

Senator STAFFORD. Mr. Ballard, do you have a comment?

Mr. BALLARD. Mr. Chairman, the IADC has no position on preemption and basically defers to the API and the other gentleman. We're basically on the OCS and we're not generally in the States.

Senator STAFFORD. All right. Mr. Iarossi?

Mr. IAROSSI. Mr. Chairman, the API does believe that preemption in some form is an essential principle in the development of a domestic comprehensive oil spill legislation. We feel that way primarily because we think that the Federal legislation should be based on a single body of law, particularly when it comes to the settlement of damage claims, and we believe that that is a fundamental principle as we try to develop a very comprehensive domestic program. The problem we have is that the word "preemption" tends to raise a lot of different opinions within different folks, and we can all take an emotional side, one side or the other. But if we try to look at preemption in different phases—because we can talk about preemption as it regards the settlement of damage claims; we can talk about preemption as it regards State funds and State taxing authority for those funds; we can talk about preemption of State funds as it relates to cleanup and also as it relates to the settlement of damage claims.

So I think there is a need to clarify and to understand what our thoughts are, specifically, about the different facets of preemption.

Senator STAFFORD. Let me ask you a practical question. In testimony that one of you gave this morning, you indicated there were a variety of State laws and some five or more Federal laws that might affect liability questions at the present time. Would you not be better off with one Federal law rather than several, even if

there were no preemption of States' rights? I would think you would be, but maybe I'm wrong. Mr. Prokop?

Mr. PROKOP. No; I concur with that. That would be a step in the right direction.

Senator STAFFORD. Mr. Ballard? No position?

Mr. Iarossi?

Mr. IAROSSI. We'd have to study that a little bit, Mr. Chairman. It's an interesting concept, but we really haven't thought it through.

Senator STAFFORD. All right. I hope you will.

Estimates for the damages from the *Amoco Cadiz* range as high as $1 billion if all Government cleanup costs and private claims are found to be justified. More conservative estimates of costs, not including prejudgment interest and inflation, range from over $200 million to over $500 million. Given that there has been an actual incident with costs likely to exceed $200 million, what is the basis for asserting that a $200 million limit, for instance, would be sufficient?

Mr. IAROSSI. Mr. Chairman, certainly, the *Amoco Cadiz* was a very large and very regrettable incident. If you look at incidents within the United States, and the Coast Guard has sponsored a study like that, that particular study indicated that there have only been four spills in the United States which have exceeded $10 million. This did not include the most recent spill which affected Senator Bentsen's and my State, the *Alvenas*. The study was done before that. But excepting that particular incident, there were only four above $10 million, and there were no incidents, going back, that exceeded $20 million.

There also is, in our view, some difference of opinion as to where the *Amoco Cadiz* settlement will come out. There are some studies that say that it will be under the $200 million figure.

As we have put forward in our statement, the important thing, in our view, is the principle that the fund have a cap. Now, whether that reasonable cap is $200 million, as in the international protocols, or $350 million, as proposed in your committee's bill, I think there is room to be on either side of that.

Senator STAFFORD. All right.

Any further comment on that one?

[No response.]

If not, Senator Chafee.

Senator CHAFEE.I don't have any questions, Mr. Chairman. I'm interested in all the points that have been raised—the preemption and the cap—I've got to learn more about these, look over the testimony and the arguments that Senator Mitchell has made in the past on this subject.

Thank you very much, Mr. Chairman.

Senator STAFFORD. Thank you, Senator Chafee.

Senator Bentsen.

Senator BENTSEN. Thank you very much, Mr. Chairman.

Mr. Chairman, I share the concern on the question of the limits, whether it's $200 million or $500 million. And as I look at that, and as you cite the instances, and that they are few, since insurance premiums are predicated on occurrences in the past as they try to project them into the future, if they are that few then I would not

think it would be that extreme an increase in the premium cost, to go from $200 million to $500 million. And the contributions of the oil companies cut off at a predesignated point to the fund, once it reaches it.

I frankly think trying to have the additional protection would be warranted in that regard. Do you have any comment concerning that, further than what you have already stated?

Mr. IAROSSI. Well, I think from our perspective, Senator, we would be most interested in the cap on the fund itself as far as the amount of contributions which would be required to accumulate in the fund. Our brief analysis of the bill introduced by Senators Mitchell and Lautenberg is that the fund would grow to $350 million, and that level of contribution would come from the oil industry and its consumers. And I think we need to study very carefully whether that level of fund accumulation is really excessive for the purpose that it needs to serve.

Senator BENTSEN. That is more of your concern than the other?

Mr. IAROSSI. Yes. It's not the ultimate insurability piece of it; it is the accumulation of funds.

Senator BENTSEN. Mr. Ballard, I have had meetings with a number of drilling contractors who are concerned about the liability provisions, and I brought that up when Secretary Dole was testifying and said that I would work to try to see that that liability was more appropriately on the leaseholder who had the major interest. And we have a problem of whether drilling contractors are going to continue in the business without that.

You cited the problem, as I understand it, but I had discussed that with Senator Mitchell and others; and his bill, it seems to me, now appropriately takes care of that. I'm not sure that you commented on that as to it having been taken care of in this particular piece of legislation.

Mr. BALLARD. Senator, the way we——

Senator BENTSEN. Have you studied S. 2799? Maybe I should ask you that.

Mr. BALLARD. No, sir. I have not seen that bill.

Senator BENTSEN. I see.

Mr. BALLARD. And that's probably part of the problem; I haven't seen it.

Senator BENTSEN. I understand. All right. I would like for you to look at that and tell me in writing whether you now believe that that misallocation of liability has been corrected and appropriately so; and if not, why not. If you would do that, that would be helpful to me.

Neither the House bill nor the international regimes have appropriately taken care of the compensation problem such as the spill we had coming up from Mexico. That has a terrible effect on fishing and tourism in a State like Texas. Is there any comment concerning the adoption of this provision by any of you? Do you have any quarrel with what we're trying to do there?

Mr. IAROSSI. No.

Senator BENTSEN. OK.

The other one was a question on the current OCS law. It contains provisions allowing direct action against guarantors in language that has made the insurers unwilling to certify policies. It's

written for OCS operators who become guarantors under that act. So for a lot of years I've tried to find a vehicle, a provision, that would allow direct action in a way that insurers were willing to accept it, so that it would work.

I think we have accomplished that, and I think that the Mitchell bill does that. It replaces a problematic OCS provision with a general financial responsibility, a direct action provision with which insurers and operators could be more comfortable.

Now, have you had a chance to study that? And do you think that resolves that problem?

Mr. BALLARD. Senator, I haven't seen the initial bill, as I told you, but I think that there's a number of people with the current law, to be totally frank with you, that probably wouldn't have any trouble with the potential liability of an insurer or guarantor. The problem is that the insurance companies are bothered with it, and they won't write the policy.

Senator BENTSEN. That's exactly what I'm saying.

Mr. BALLARD. So——

Senator BENTSEN. So the end result is that you don't get the policy. And what I'm saying is—and I know that is not your field, or I assume it isn't—is that I wish you gentlemen would take a look at that point and talk to your insurers in turn, and see if you think that's been resolved where you will find insurance more available.

That's all the questions I have, Mr. Chairman.

Senator STAFFORD. Thank you very much, Senator Bentsen.

The Chair is about to recognize Senator Lautenberg for questions, but first let me put people on notice that after conferring with Senator Bentsen and the chairman of the subcommittee involved in this jurisdictional area, it would be the Chair's intention to utilize S. 2799, which a majority of the committee, I believe, are now cosponsoring, in lieu of the original bill which was rather hurriedly put together, to have a markup bill available. So S. 2799 will be the markup vehicle when we start markup next week.

Senator Lautenberg.

Senator LAUTENBERG. Thank you, Mr. Chairman. I'll try to be brief.

I want to focus on the safety and prevention issues this morning, so, Mr. Iarossi, if you don't mind—I don't want you two others to feel neglected in this, but in particular, since our spills and our problems have come largely as a result of shipping, I'd like to focus on that.

Mr. Iarossi, what laws, international and domestic, can you think of real quick that regulate shipper safety practices and personnel qualifications?

Mr. IAROSSI. Well, Senator, on the domestic side the most important one is the Port and Tanker Safety Act of 1978. There are a number of recent international agreements, and some going back a number of years. My colleague is Mr. Peter Ghee of Mobil Oil Corp., and I'd like him to address the international side of that particular question.

Mr. GHEE. The statute that was cited by Mr. Iarossi, in fact, does allow inspection of foreign flag ships coming into the United States; plus, of course, the MARPOL, which has been ratified by

the United States. So there is in place today—and, in fact, it is being done; as a matter of fact, it's being done very well by the Coast Guard—a mechanism to inspect foreign vessels entering into the United States, both with respect to their—well, it's a wide variety of inspections, but it basically goes to the operations, their manning, their maintenance, etc. And they have the power to refuse them to come here if they don't meet those standards.

Senator LAUTENBERG. Are the international rules and standards more stringent, in your view, than those that we currently have in place domestically?

Mr. GHEE. In my view, the U.S. rules are more stringent than the international rules. But we apply them to the foreign vessels, as well.

Senator LAUTENBERG. OK. But the foreign flag carriers are subject often to lesser standards, at least on a routine basis, carrying more and more of the cargo—they could present us with more operating problems, personnel problems, mechanical problems than we otherwise might see. Is that a fair assumption?

Mr. GHEE. What you're really referring to, Senator, is what we call by a code word, a "substandard ship," a ship that poses a risk by either its maintenance or its equipment or its manning. And I don't think that the market—the low rates in the market; and by the way, those rates have substantially gone up recently in the charter market—have driven or increased the number of substandard shipped. They have, to a great extent, reduced the number of operating ships. In other words, there are many more ships in layup. That's not to say that there isn't the problem of the substandard ship; but there is in place today, legislation in this country which allows for inspection in an attempt to weed out, coming into U.S. waters, substandard ships.

Now, I have no statistics on which you could talk to the Coast Guard, but my understanding and perception is that the Coast Guard is doing a very diligent job in weeding out these substandard ships.

I might also add, if it's worthwhile, that most of the charterers of the vessels have elaborate procedures to weed out and prevent the chartering of substandard ships in the first place. There's another feature that's going on. That is not legislatively driven; that is just driven for practice.

Senator LAUTENBERG. But despite the fact that you say there has been a recent price increase for the transportation side of the——

Mr. GHEE. The charter market has dramatically gone up, the international charter market.

Senator LAUTENBERG. But there's lots of capacity out there, obviously?

Mr. GHEE. Oh, yes.

Senator LAUTENBERG. Lots of it lying dormant, and thereby perhaps creating a more aggressive, competitive environment; certainly among the companies and shipowners, I would guess that there's a pretty strong desire to get these things afloat and at work. I mean, even if it covers the fixed costs, the costs for purchase and amortization and so forth. So there's a pretty intense competitive marketplace out there, is it fair to say?

Mr. GHEE. I can't really comment, because I'm not a chartering man, on how that market is working right now.

Senator LAUTENBERG. OK.

I think you all see where I'm going on this thing. We begin to recognize that there are more and more accidents taking place. The consequence of these things is very significant. We are especially sensitized in our area because of the number of spills that are taking place and the volume of material that has been discharged. I'm looking to find out why these things are happening. There is a lot more attributable to mechanical or physical problems than there used to be. Is it simply, Mr. Iarossi, the fact that we're discovering it now? What, in your judgment—are you familiar with it? This must be a national problem, not just a regional thing.

Mr. IAROSSI. Senator, I think the standards of both construction and maintenance have gotten far more stringent and have increased considerably since the early 1970's, and particularly, since the incident of the Amoco Cadiz. I think the equipment, both domestic and international, is better built and better maintained.

I think—and I would ask that while we have a concern that's a valid concern, we need to look at the causes for the particular incidents, both the three that you mentioned in the Delaware River, the Alvenas that impacted Texaco—or the coast of Texas. I think if we study that—of course, the most recent incident and the one that is of most pertinent alarm right now, neither the Coast Guard nor the owner nor the charterer have yet had the opportunity to pinpoint exactly the cause. But if we look at some of the previous ones, they do not relate to the construction standards or the maintenance. They have been primarily navigational errors.

Senator LAUTENBERG. Does that suggest that there's been less stringent requirements for crew, shipmasters, etc., than there used to be?

Mr. IAROSSI. I don't believe that's true. In fact, there has been an international agreement which has set the standards for both training and watchkeeping of personnel, and that has created—in our view—a significant improvement. That is a very recent agreement. The navigational errors when we get into domestic waters, or the navigational events, probably do not involve the operating crew of the vessel.

Senator LAUTENBERG. Well, what would it involve? You know, you are talking in front of a former ship commander here in Chairman Stafford, and——

Senator STAFFORD. We always blamed the engine room.

Mr. IAROSSI. Well, being a past chief engineer, I don't think I'd go along with that.

Perhaps we can learn a little bit if we discuss the incident with the *Viking Osprey,* and Mr. Ghee is prepared to talk a little bit more about that. It may be very helpful in trying to understand what really transpires with one of these.

Senator LAUTENBERG. I'm interested in his comments, certainly, but we have a number of these incidents taking place. If we strike out the mechanical, if we strike out the crew training problems—if it is suggested that there are navigational problems, then someone is responsible for that. Do we want to blame the Coast Guard for

not updating the charts? I mean, there's got to be someone who has responsibility for this. Do you want to comment on it?

Mr. GHEE. Well, I think the reason that Frank Iarossi mentioned—it had nothing to do with the crew here—was not because there was absolutely nobody in charge, but there was a Delaware River pilot conning the ship up the river.

As best we can gather, this particular ship seems to have been holed in some way or another in the vicinity of its No. 1 center tank. The interesting thing today is, of course—I might add that we, and the owner, should be, and his insurers, Amoco-Scott, rather proud of this particular cleanup because this one is going very well and we have already removed from the river a little over half the oil that we believe is in there. And, of course, the cleanup is going along; as a matter of fact, I was told today that the Coast Guard told us that this particular operation is in the second day in what would normally be the sixth day.

For your information, the response was within 30 minutes of noting the first oil out of the ship.

As far as fault is concerned in what really happened here, we don't really know.

Senator LAUTENBERG. No. In this particular case, it's still too early. As I indicated, I'm going up there this afternoon. But just in general, this single incident doesn't describe what's been happening generally. I mean, this legislation is not being developed because we had this accident coming on Wednesday, when the legislation was introduced Tuesday.

Mr. GHEE. I think one of the problems you have, in my experience—and I'd like to ask Frank to do the same, in shipping operations—as probably in any other form of transportation, whether it's trucks or planes or what have you, most failures and most accidents are attributable to some sort of human failure. That human failure is not necessarily related to the nationality of the person. It's probably somewhat more—it could be related to his training, but there are a lot of other factors, some of which—at least, in my view—are psychological which operate here too. It's sort of like the phenomenon of the boredom of the highway, you know, where you keep repeating the same scene on the highway and you sort of get hypnotized by the monotony of it.

Be that as it may, though, there are in place today— and by the way, Frank mentioned this watchkeeping convention, which is very helpful. It has not been ratified by the United States, by the way, but it is enforced generally abroad, and it has been very, very helpful. Training in nonsubstandard ships is very good, we feel.

Senator LAUTENBERG. Are you talking about the nationality of the captain of the ship?

Mr. GHEE. The captain and the crew.

Senator LAUTENBERG. Well, how do we know that? I mean, we're not running national origin tests there. Just because it's a Panamanian flag, does that mean it has a Panamanian skipper?

Mr. GHEE. Well, actually, this particular ship had a Philippine crew and skipper, and it was of Singapore registry.

What I'm saying is, the nationality of the crew is irrelevant.

Senator LAUTENBERG. I agree, but the chartering agency or the licensing agency, nationally directed, can often be a contributing factor.

Mr. GHEE. Oh, oh, I'm sorry. Yes, of course.

Senator LAUTENBERG. I'll wrap up, Mr. Chairman, with one last question of Mr. Iarossi.

What do you think are the major causes of the spills that we've had? Can you categorize them? There is some common denominator, I would guess, through most of these. What do you think they are?

Mr. IAROSSI. My personal opinion would be that if we studied them, the major locale in which spills occurred would be in restricted waters. In those restricted waters we need to first recognize—and we've been trying to get to this, in response to your question about standards of foreign crews— that in restricted U.S. waters, we actually have U.S. citizens in control of those vessels through pilotage organizations. I'm not implying that the pilot is at fault, but the vessel is in the greatest danger when it is, in fact, in restricted waters. Danger from other traffic as it relates to potential collisions, and danger from running aground because, for one reason or another, it's outside of the navigation channel.

But if we try to stack up all of the causes or potential causes—explosions or mechanical problems—it seems to me we would probably find that errors, either on the tanker or on other vessels, relating to navigation may in fact be one of the largest contributing factors.

Senator LAUTENBERG. Thank you Mr. Chairman. Thank you very much.

Senator STAFFORD. Thank you very much, Senator Lautenberg.

Gentlemen, we really thank you for coming here and helping us this morning.

Senator STAFFORD. The committee will stand in recess.

[Whereupon, at 11:16 a.m., the committee was adjourned, subject to the call of the Chair.]

[Statements submitted for the record follow:]

AMERICAN PETROLEUM INSTITUTE
Testimony on Comprehensive Oil Pollution Liability
and Compensation Legislation
Before the Senate Environment and Public Works Committee
September 12, 1986

Good morning Mr. Chairman. My name is Frank Iarossi. I am President of Exxon Shipping Company, and represent the American Petroleum Institute (API). The Institute is a trade association of 220 member companies and 5000 individuals engaged in all aspects of the petroleum industry. Thank you for inviting API to appear today to comment on S. 2340 and the general subject of oil spill liability and compensation legislation.

Oil spills can occur on navigable waters, irrespective of whether they are under federal, state or international jurisdiction. Establishing a single, sufficiently large federal fund, can result in quicker, fairer, more uniform and efficient settlement of damage claims than the present uncoordinated hodgepodge of federal, state and international schemes. In areas covered by such federal legislation, state jurisdiction would have to be superseded. Otherwise, the federal fund would be nothing more than a redundant bureaucracy, and another forum for legal warfare. The settlement of claims would be less efficient and the fund would be another disguised tax on the American consumer.

Historically, API has supported the concept of comprehensive domestic oil pollution liability and compensation legislation. This is the sixth Congress in which such legislation has been introduced. Several versions passed the House, but failed to be enacted. There is general agreement that oil spill legislation is needed, and past disagreements over specific provisions have been narrowed substantially, though not eliminated. However, S. 2340 does not reflect the progress made over the last eight years. Indeed, it is similar to a Senate bill considered in 1978, and we view it as an anachronism. Our main problems with S. 2340 and bills which contain similar objectionable features, are as follows:

- The bill does not in any way pre-empt state oil spill liability laws and funds.
- In the most likely situations, the bill does not limit a spiller's liability for a polluting incident.
- There is no taxing mechanism.
- The bill does not cure the problems that exploration and production sectors of the industry have with Title III of the Outer Continental Shelf Lands Act Amendments of 1978.
- It would allow for a wide range of claims against the federal fund, as well as authorize fund expenditures for such costs as research and development, and federal response equipment and personnel. Congress and the administration should consider these in the usual budgetary process.
- S. 2340 does not rebate or credit to contributors monies paid by the industry to the Deepwater Port and Outer Continental Shelf funds, which would be

terminated. Further, the bill transfers the Trans-Alaska Pipeline Authorization Act (TAPAA), fund to the federal treasury instead of returning it to those who paid into it. This would place a grossly disproportionate burden on the contributors to these funds.

These major problems have been carefully addressed over the last eight years by the House Merchant Marine and Fisheries Committee, the Administration, API, and many others. Because this bill does not reflect these efforts, API supports the position of Secretary of Transportation Elizabeth Dole, who testified on April 29, 1986 that major changes need to be made in S. 2340 before she can support it.

To correct some of the shortcomings which we perceive in S. 2340, API recommends the following changes:

- Section 7 of S. 2340 provides that "Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the discharge of oil or other pollution by oil within such State." Since the bill does not preempt state statutes, tanker operators and other responsible parties would be subject to many different standards of liability and limits of liability which may have been established in the various states in which they operate. While recognizing the Senate's concern regarding preemption, industry supports federal oil spill legislation on the condition that it provides a uniform standard of liability and a set of liability limits throughout the U.S., as well as a single federal fund. Therefore, we urge that preemption be addressed, with the objective of developing provisions which fully protect the interests of individual states and claimants, while assuring the uniformity of a single federal regime.

- If a federal fund is established, it should complement but not replace state funds. Under H.R. 1232, for example, the federal fund would cover costs for cleanup and damages from most, but not all, spills in navigable waters. State funds could continue to be used for such needs as training, research, equipment purchases, and cleanup of any spill not covered by the federal fund. While the states would be precluded from taxing industry for costs covered under the federal fund, they could, instead, recover from the federal fund any costs attributable to a covered spill. We believe that the provisions of H.R. 1232 offer states more protection while preserving their funds for purposes not covered by the federal fund.

- In addition to liability limits being uniform nationwide, they should be firm and unbreakable unless the spill is caused by willful misconduct or gross negligence. Such limits are needed by tanker owners and operators to obtain requisite insurance coverage.

- Indemnification should also be incorporated to permit offshore contractors to obtain insurance. This would remedy the problem for oil exploration and production companies in complying with Title III of the Outer Continental Shelf Lands Act Amendments, 1978.

- It is essential that the spiller's right to limit liability should not be lost through minor infractions of federal law. Section 3 (c)(2) of S. 2340 provides that the liability limits would not be applicable if a spill is

caused by "a gross or willful violation (within the privity or knowledge of the owner or operator) of applicable safety, construction, or operating standards or regulations;". There are thousands of such standards and regulations, many subject to differing interpretations. In addition, the word "standard" is undefined and a court could interpret it broadly enough to render the limitation on liability meaningless. The right to limit liability should be lost only when a knowing and willful violation of federal regulation directly causes the spill.

- An upper liability limit of $200 million per incident is fully adequate. We also believe the minimum owner's limit of $8 to $10 million dollars per vessel is appropriate, rising to a maximum of $70 million dollars for vessels larger than 100,000 gross registered tons. We urge that liability limits be established at levels sufficient to protect the interests of claimants, and to offer strong incentives to vessel and facility owners to maintain high operating and maintenance standards.

- A cap on collections for the federal fund should be established. Based on historical data, a $200 million fund would be sufficient to cover response and compensation costs. The 1.3 cents per barrel tax proposed in H.R. 1232 is designed to reach the desired fund level quickly, within three years. Once the fund reaches this level, further payments should be suspended until withdrawals reduce the fund below some specified level. It is a matter of deep concern to this industry that it not be taxed beyond the level required to meet the costs for this program. When this level is reached, collections should stop. Existence of this large fund would protect the public by guaranteeing that claimants would be promptly compensated. States and their citizens would enjoy far greater protection than is currently available under state laws.

- Costs which would be covered under S. 2340 are in several instances so broad as to invite sizeable claims of dubious merit. A federal fund should compensate for documented removal costs and proven direct costs or economic losses resulting from a spill. Consequently, while we support provisions for the restoration or acquisition of damaged natural resources we seriously question the wisdom of allowing claims such as for "any loss of use of any natural resources without regard to the ownership or management of such resources."

  Similarly, compensation for verifiable loss of income on profits or impairment of earning capacity resulting from a spill should be limited to, for example, a two-year period.

We endorse the provisions of S. 2340 which cover spills from drilling and producing facilities and pipelines inside coastal states' maritime boundaries. Coverage should not be limited to spills from facilities located on the OCS beyond the three-mile limit. We agree that coverage should include spills from shore facilities and pipelines immediately adjacent to navigable waters. This is necessary because many spills cross state maritime boundaries, whether from vessels, pipelines, producing facilities or shoreside terminals.

The legislation should establish an advisory committee to the Secretary of Transportation for administering claims and operating the federal fund. Participation by those paying into the fund and those benefitting from it

would improve its effectiveness. Administrative uncertainties could result if the fund is subject to annual appropriations acts and competing budgetary demands. The entire amount contributed, plus accumulated interest, fees, and penalties, should be reserved for the payment of cleanup costs and allowable damage claims.

S. 2340 would terminate existing federal funds. The monies in these funds, except for the TAPAA fund, should be credited to the original contributors. TAPAA money should be returned to the original contributors, rather than be retained by the government, once collections for the new oil spill fund have been initiated. This would offer equitable treatment for those who have been paying into these funds for years.

Congress should give particular attention to states' concerns about the adequacy and availability of federal funds to meet state needs when spills occur. Some states oppose pre-emption of state taxation provisons because they believe that a federal fund will not be an adequate substitute for monies which they directly control and can promptly spend in an emergency. To eliminate this concern, federal legislation should give governors immediate authority, pre-arranged with federal administrators, to expend money from the federal fund on an emergency basis to prevent or clean up oil spills. This is particularly important if the Coast Guard or the responsible party will not or cannot take immediate action.

In summary, Mr. Chairman, these recommendations are intended to promote an effective response to oil spills, provide an equitable and efficient system for financing and managing oil spill response activities and greater protection for states and their citizens than currently available under state law.

We stand ready to help this committee and the Senate in any way in your effort to serve the public. Thank you for this opportunity to express API's views.

PD2.73sb

9/10/86

STATEMENT

ON

COMPREHENSIVE OIL POLLUTION LIABILITY AND COMPENSATION LEGISLATION

Marshall Ballard

General Manager

Penrod Drilling Company

Dallas, Texas

On Behalf of the

INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS

At Hearings Before the

Committee on Environment and Public Works

United States Senate

Washington, D.C.
September 12, 1986

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: I AM MARSHALL BALLARD, GENERAL MANAGER OF PENROD DRILLING COMPANY OF DALLAS, TEXAS. PENROD DRILLING COMPANY IS ONE OF THE WORLD'S LARGEST OFFSHORE DRILLING COMPANIES. I AM APPEARING ON BEHALF OF THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS (IADC). IADC IS A TRADE ASSOCIATION REPRESENTING OVER 1300 MEMBER COMPANIES WORLDWIDE, ENGAGED IN ALL ASPECTS OF DRILLING OF AND EXPLORATION FOR HYDROCARBONS. WE APPRECIATE THE OPPORTUNITY TO COME BEFORE THE COMMITTEE TO GIVE YOU OUR COMMENTS ON THE PROPOSED COMPREHENSIVE OIL SPILL LIABILITY LEGISLATION NOW BEFORE YOU.

BEFORE DOING SO, WE WOULD LIKE TO NOTE THAT IADC HAS TESTIFIED BEFORE CONGRESS SEVERAL TIMES OVER THE YEARS TO DISCUSS NEEDED AMENDMENTS TO TITLE III OF THE OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS OF 1978 WHICH ESTABLISHED THE LIABILITY AND COMPENSATION SCHEME FOR DAMAGES RESULTING FROM OIL SPILLS ON THE OCS. THE PRINCIPAL CONCERNS WE VOICED IN THE PAST HAVE IN LARGE MEASURE BEEN CONSIDERED AND ADDRESSED BY THE HOUSE OF REPRESENTATIVES AND ARE INCORPORATED IN PRESENT PENDING LEGISLATION, H.R. 2005's OIL SPILL TITLE. THE OVERALL PURPOSE OF THIS TITLE, DERIVED FOR THE MOST PART FROM LEGISLATION PASSED LAST YEAR BY THE HOUSE AS H.R. 1232, WAS THREEFOLD: TO CLARIFY THE LIABILITY AND PENALTY PROVISIONS IN TITLE III, TO RAISE THE LIABILITY LIMITS FOR CERTAIN PARTIES, AND TO APPORTION THE LIABILITY AMONG THE PARTIES OPERATING ON THE OCS TO REFLECT MORE CLOSELY THE PREVAILING INDUSTRY PRACTICE THAT EXISTED BEFORE THE ENACTMENT OF TITLE III. CERTAIN TECHNICAL AMENDMENTS CLARIFYING THE LIABILITY

PROVISIONS OF TITLE III WOULD FACILITATE THE GROWTH OF A MARINE INSURANCE MARKET FOR OCS-RELATED ACTIVITIES BY REMOVING THE AMBIGUITIES THAT MAY AFFECT THE POTENTIAL LIABILITY OF INSURERS AND GUARANTORS. BECAUSE OF THE PERCEPTION IN THE INSURANCE INDUSTRY THAT UNDER CERTAIN CIRCUMSTANCES INSURERS AND GUARANTORS ARE SUBJECT TO UNLIMITED LIABILITY FOR OIL SPILL CLEANUP AND REMOVAL COSTS, THERE CURRENTLY EXISTS NO INSURANCE MARKET TO COVER SUCH RISKS.

THE NEED FOR AMENDMENTS TO TITLE III HAS BEEN EMPHASIZED YEAR AFTER YEAR BY THE U.S. COAST GUARD IN ITS ANNUAL REPORT TO CONGRESS ON THE ADMINISTRATION OF THE OFFSHORE OIL POLLUTION COMPENSATION FUND. THIS NEED IS STILL WITH US TODAY. WE HOPE THE COMMITTEE AND THE SENATE WILL RECOGNIZE THE IMPORTANCE OF THESE PROVISIONS TO THE DEVELOPMENT OF THE OFFSHORE OIL INDUSTRY AND IN TURN THE NATIONAL RESOURCES AND NATIONAL SECURITY OF THIS COUNTRY.

WE STRONGLY SUPPORT ENACTMENT OF COMPREHENSIVE OIL SPILL LEGISLATION. PRIOR TO THE ENACTMENT OF TITLE III, THE OFFSHORE INDUSTRY PRACTICE GENERALLY WAS TO INCLUDE INDEMNITY PROVISIONS IN CONTRACTS BETWEEN OFFSHORE DRILLING CONTRACTORS AND OCS LEASEHOLDERS. THESE INDEMNITY PROVISIONS GENERALLY CONTAINED TWO COMPONENTS. THE FIRST WAS THAT THE LEASEHOLDER AGREED TO INDEMNIFY AND HOLD THE DRILLING CONTRACTOR HARMLESS FROM LIABILITY FOR OIL POLLUTION ORIGINATING BENEATH THE SURFACE OF THE SEA. THE SECOND COMPONENT OF THE INDEMNITY PROVISIONS PROVIDED THAT THE DRILLING CONTRACTOR WOULD BY CROSS-INDEMNITY, INDEMNIFY AND HOLD HARMLESS THE LEASEHOLDER FROM ANY LIABILITY FOR OIL POLLUTION ORIGINATING ON BOARD THE DRILLING UNIT.

THE REASONS WHY SUCH INDEMNITY ARRANGEMENTS EVOLVED ARE NUMEROUS. FIRST, IT WAS RECOGNIZED THAT THE POTENTIAL ECONOMIC INTEREST OF THE LEASEHOLDER IN THE LEASEHOLD FAR EXCEEDS THAT OF THE DRILLING CONTRACTOR WHO IS HIRED BY THE OWNER OF THE POTENTIAL MINERALS TO PROVIDE ONLY DRILLING EQUIPMENT AND PERSONNEL. IT WAS ALSO RECOGNIZED BY BOTH DRILLING CONTRACTORS AND OCS LEASEHOLDERS THAT THE DRILLING CONTRACTOR HAS LIMITED ASSETS AND COULD NOT AFFORD TO BE EXPOSED TO UNLIMITED LIABILITY.

IT WAS RECOGNIZED AS WELL THAT THE LEASEHOLDER, BEING A BENEFICIARY OF ANY MINERALS DISCOVERED, AND HAVING PROPRIETARY KNOWLEDGE OF THE GEOLOGICAL STRUCTURE BEING DRILLED, EXERCISES A HIGH DEGREE OF DIRECTION OVER THE DRILLING OPERATION. THE LEASEHOLDER DIRECTS THE DRILLING CONTRACTOR PRECISELY WHERE TO DRILL AND DETERMINES THE MUD PROGRAM, WELL CASING PROGRAM AND OTHER FACTORS AFFECTING THE POSSIBILITY OF A RESULTING BLOW-OUT OR OTHER SUCH CAUSES OF OIL SPILLS. HISTORICALLY, THE LEASEHOLDER WAS USUALLY WILLING TO ABSORB THE PRINCIPAL FINANCIAL RISK OF LIABILITY ARISING FROM OIL SPILLS OCCURRING ON THE LEASEHOLD. HENCE, HE AGREED TO INDEMNIFY THE DRILLING CONTRACTOR FROM LIABILITY ARISING FROM THIRD PARTY SUITS. AT THE SAME TIME, IN ORDER TO INDUCE THE DRILLING CONTRACTOR TO PERFORM HIS OPERATIONS SAFELY, SOME LEASEHOLDERS INSISTED THAT THE DRILLING CONTRACTOR CROSS-INDEMNIFY THE LEASEHOLDER FOR DAMAGES UP TO A SPECIFIED AMOUNT FOR POLLUTION ORIGINATING BENEATH THE SURFACE OF THE SEA, WHEN THE CAUSE OF THE INCIDENT WAS THE GROSS NEGLIGENCE OF THE DRILLING CONTRACTOR.

THE NATURE AND EXTENT OF THE CROSS-INDEMNIFICATION WAS NEGOTIATED BETWEEN THE LEASEHOLDER AND DRILLING CONTRACTOR AS PART OF THE OVERALL DRILLING CONTRACT. AS PRESENTLY WRITTEN, TITLE III IMPOSES SEVERE AND UNNECESSARY BURDENS ON OFFSHORE DRILLING CONTRACTORS WHICH COULD DISRUPT THIS NATION'S OCS EXPLORATION PROGRAM. THERE ARE SEVERAL REASONS FOR THIS:

1. SECTION 304(a) OF TITLE III PROVIDES THAT "THE OWNER AND OPERATOR OF ... AN OFFSHORE FACILITY, WHICH IS THE SOURCE OF OIL POLLUTION, OR POSES A THREAT OF OIL POLLUTION ... SHALL BE JOINTLY, SEVERALLY, AND STRICTLY LIABLE FOR ALL LOSS FOR WHICH A CLAIM MAY BE ASSERTED UNDER SECTION 303" OF THE ACT. READ TOGETHER WITH THE ACT'S DEFINITION OF "OFFSHORE FACILITY", "OWNER", AND "OPERATOR", TITLE III IMPOSES UPON THE DRILLING CONTRACTOR JOINT, SEVERAL, AND STRICT LIABILITY FOR AN OIL POLLUTION INCIDENT. THIS STANDARD OF LIABILITY IS TOTALLY OUT OF PROPORTION TO THE COMPARATIVE ECONOMIC INTERESTS OF LEASEHOLDERS AND DRILLING CONTRACTORS.

2. THE OIL POLLUTION INSURANCE MARKET IS NOT FUNCTIONING BECAUSE INSURERS CANNOT LIMIT THEIR LIABILITY UNDER THE OCS LANDS ACT AMENDMENTS OF 1978, AND MOST DRILLING CONTRACTORS DO NOT HAVE ADEQUATE FINANCIAL RESOURCES TO SELF-INSURE.

3. AN INADVERTENT VIOLATION OF APPLICABLE FEDERAL, OR EVEN INDUSTRY, STANDARDS OR REGULATIONS BY A DRILLING CONTRACTOR MIGHT SUBJECT THE DRILLING CONTRACTOR TO UNLIMITED LIABILITY IN THE EVENT SUCH VIOLATION WAS CONSTRUED TO BE THE PRIMARY CAUSE OF AN OIL SPILL INCIDENT.

4. THE COAST GUARD REGULATIONS IMPLEMENTING TITLE III, IF STRICTLY APPLIED, WOULD REQUIRE A DRILLING CONTRACTOR TO OBTAIN A SEPARATE CERTIFICATE OF FINANCIAL RESPONSIBILITY EACH TIME ONE OF HIS RIGS IS POSITIONED TO CONDUCT DRILLING OPERATIONS.

THE BILL BEING CONSIDERED BY THIS COMMITTEE (S. 2340) FAILS TO CURE THE IADC's CONCERNS, AS EXPRESSED ABOVE, IN SEVERAL IMPORTANT WAYS:

1. THROUGHOUT S. 2340, REFERENCE IS MADE ONLY TO AN "OWNER OR OPERATOR" OF AN OFFSHORE FACILITY. IADC STRONGLY URGES THAT THE TERM "LESSEE" BE ADDED WHENEVER THE OTHER TWO TERMS APPEAR TO FULLY COVER ALL RESPONSIBLE PARTIES, WHERE AN "OWNER OR OPERATOR" MIGHT ELUDE CLEAR DEFINITION.

2. THE BILL HAS NO COUNTERPART TO THE INDEMNIFICATION LANGUAGE OF H.R. 1232. THAT HOUSE BILL PROVIDED THAT THE LEGISLATION WOULD NOT "PRECLUDE AN AGREEMENT WHEREBY A PERSON WHO, BY AN AGREEMENT WITH A RESPONSIBLE PARTY, AGREES TO INDEMNIFY THE RESPONSIBLE PARTY FOR THE LIABILITY IMPOSED" BY THE LEGISLATION.

3. SECTION 3(c)(1)(C) LEAVES UNLIMITED THE LIABILITY FOR "ALL COSTS OF REMOVAL". THIS CREATES BROAD EXPOSURE, AND SHOULD BE "CAPPED" BY A DOLLAR AMOUNT, OR THIS PHRASE SHOULD BE DELETED ALTOGETHER. LIKEWISE, SECTION 3(c)(3) REFERENCING "ALL COSTS OF REMOVAL" SHOULD BE DELETED FOR THE SAME REASON.

4). SECTION 3(e) STATES THAT LIABILITY LIMITS WILL APPLY TO "ANY CLASS OR CATEGORY OF ONSHORE OR OFFSHORE FACILITY SUBJECT TO" SECTION 3(c)(1)(E). THAT SUBSECTION IDENTIFIES "ANY OTHER (EMPHASIS ADDED) ONSHORE OR OFFSHORE FACILITY". THUS, THIS MIGHT BE CONSTRUED AS NOT APPLYING TO OCS FACILITIES AS DEFINED IN S. 2340.

5. SECTION 5(b)(3)(E) PROVIDES THAT THE STATUTE OF LIMITATIONS SHOULD RUN 6 YEARS FROM THE POLLUTION INCIDENT OR DISCOVERY OF LOSS, WHICHEVER IS LATER. IADC URGES THAT THE APPROACH OF H.R. 1232 BE SUBSTITUTED HERE, PROVIDING A 3 YEAR LIMIT AFTER DISCOVERY OF LOSS OR 6 YEARS AFTER THE INCIDENT, WHICHEVER IS LATER.

6. THE "FINANCIAL RESPONSIBILITY" SECTION 6(b)(2) LEAVES AMBIGUOUS THE DIMENSIONS OF CIVIL PENALTIES TO BE LEVIED FOR NON-COMPLIANCE. H.R. 1232 PROVIDES MORE CLEARLY FOR MITIGATING CIRCUMSTANCES, WHICH THE COAST GUARD CURRENTLY CONSIDERS IN ASCERTAINING SIMILAR PENALTIES LEVIED UNDER OTHER PROVISIONS OF TITLE 46 U.S.C.

MR. CHAIRMAN, THERE HAS LONG BEEN A GENERAL CONSENSUS AMONG DRILLING CONTRACTORS, OIL COMPANIES AND ENVIRONMENTALISTS THAT A COMPREHENSIVE OIL POLLUTION LIABILITY AND COMPENSATION REGIMEN IS AN IDEA THAT'S BEEN TOO LONG IN COMING. ABSENT LEGISLATION, INSURANCE COSTS FOR THE DRILLING INDUSTRY ARE LIKELY TO MOUNT IN THE FACE OF UNCERTAINTY AS TO LIMITS OF LIABILITY. THE COAST GUARD CONTINUES TO CALL FOR CONGRESSIONAL CLARIFICATION OF ITS MANDATE TO ADMINISTER TITLE III OF THE OCS LANDS ACT AMENDMENTS OF 1978. WE URGE EXPEDITIOUS SENATE ACTION TO RESOLVE THIS PERENNIAL ISSUE.

Remarks of John Prokop
President, Independent Liquid Terminals Association

on September 12, 1986

before the Senate Committee on Environment and Public Works

on S. 2340, Oil Pollution Liability and Compensation Act of 1986,
on S. 2799, a similar bill, and on H.R. 5300
The Comprehensive Oil Pollution Liability and Compensation Act,
and on two International Oil Spill Conventions
(Civil Liability for Oil Pollution Damage; and
the International Fund for Compensation for Oil Pollution Damage)

Mr. Chairman, Committee members, I am pleased to be here today to comment on this important legislation.

My name is John Prokop and I am President of the Independent Liquid Terminals Association.

ILTA is an international organization comprised of 60 companies with more than 280 terminals which can contain at one time in more than 8,100 storage tanks over 220,000,000 barrels of bulk liquid commodities essential to U.S. and world commerce. More than 250 of these waterside tanker and barge terminals are located in 38 states in the United States. The remaining terminals are located in 14 other nations.

ILTA members handle and store bulk liquid commodities including crude oil, petroleum and petroleum products, a wide variety of chemicals, liquid fertilizers, edible and non-edible animal fats and oils, vegetable oils, molasses, and spirits.

ILTA represents terminal operators who do not own the commodities stored at their facilities, but who lease storage tanks to bulk liquid commodity owners and provide product transfer and other terminaling services for a fee.

The commodity owners who lease storage at ILTA member company tank farms include major oil and chemical companies, utilities, manufacturers, transportation companies, and military and government agencies.

ILTA represents companies which vary greatly in size, from quite small to large storage terminals. However, most of our members operate small- to medium-size facilities, and many are still family-owned businesses.

ILTA's comments today are made only on behalf of its members with facilities located in the United States of America.

Personally, I have been involved with proposed oil spill legislation since the early 1970's. This includes the FWQIA, the FWPCA, and the Clean Water Act, numerous House oil spill superfund proposals, numerous Senate oil spill liability and compensation bills, and the international oil spill conventions.

As you might imagine, over this extensive period of time, many of our concerns with the oil spill legislation as initially proposed have been resolved by the committees and staffs forging this legislation. However, a few concerns remain.

We concur with a large number of diverse organizations that the current legal regime covering oil spill liability and compensation consists of a hodge-podge of at least five federal laws, 24 specific state laws, and common law in states where the issue is not addressed by specific legislation.

We need a comprehensive national oil spill and compensation law that:

1. Makes sure that those suffering an accidental discharge pay for cleanup and damages.

2. Makes sure that legitimate claims for cleanup, damages, and restoration of the environment (where possible) are promptly and adequately compensated.

3. Protects against spurious and ethereal claims for cleanup, damages, and restoration of the environment, and pie-in-the-sky claims.

4. Makes sure that the liabilities it includes are "insurable" and encourages the insurance industry to underwrite the necessary coverages rather than scaring them away and causing them to abandon the market.

5. Develops a fund to cover illegal mystery spills and unusual and rare accidental catastrophic spills in which cleanup and damage liability exceeds the discharger's ability to pay.

6. Recognizes that "unlimited liability" is illusory, particularly since it cannot be insured; and that, theoretically, "unlimited liability" always exceeds the total assets of any person or company suffering a discharge.

7. Avoids harsh and unrealistic liability and other provisions which only serve to impede enactment of a workable oil spill compensation act and, instead, contains provisions which will have the universal support of the Congress, the Administration, Environmentalists, Industry, and the Public.

8. Recognizes that although the fee to finance the fund is imposed on the "oil industry," it is the consumer of oil and the consumer of oil-produced goods and services that ultimately will pay the bill.

9. Eliminates subjecting an accidental discharger to dual liability from both federal and state laws for the same cleanup and damage costs.

10. Pre-enpts states from keeping the many conflicting oil spill liability and compensation acts they have enacted, and requires states to adopt, enact, and enforce all or a part of a minimum federal oil spill liability and compensation act, as may be appropriate, in concert with the U.S. Coast Guard and the U.S. Environmental Protection Agency.

    (The embryo for this concept already appears in some provisions in the oil spill legislation approved by the House of Representatives this year. It would be similar to the way states now adopt and administer the Clean Air Act, RCRA, and certain sections of the Clean Water Act.)

11. Focuses on dealing with vessels and offshore facilities for producing and handling oil as the proven "most likely" sources of catastrophic discharges.

NEW LIABILITY PROVISIONS

THE NEW, STRINGENT, FAR REACHING LIABILTY PROVISIONS IN THE OIL SPILL BILLS WILL CAUSE UNDERWRITERS TO CONSIDER AGAIN WHETHER THEY WILL ELIMINATE OIL SPILL COVERAGE FROM THEIR POLICIES OR LIMIT THE EXTENT AND LEVEL OF THEIR COVERAGE. THE NEW PROVISIONS MAY ALSO DISCOURAGE RE-INSURERS FROM WRITING THE EXCESS LEVELS OF COVERAGE SUCH LIABILITY PROVISIONS WOULD DICTATE AS PRUDENT.

Normally, existing liability insurance policies cover bodily injury and property damage.

Any new legal liability regime, such as that proposed in S. 2340, S. 2799, or any of the 1985-86 House bill proposals, could disrupt the availability of oil pollution insurance.

The provisions in the proposed legislation expand a discharger's legal liability, and thereby establish expanded financial liability. Some of these provisions would also establish a higher aggregate financial liability. Existing liability policies do not cover the new liabilities, particularly with regard to environmental restoration and compensation for lost revenues, among other new types of oil spill liability.

Since insurance underwriters feel it is difficult to determine accurately the extent of financial loss, particularly where habitat, wildlife, and marine life are involved, they most likely will be reluctant to cover these liabilities.

ILTA is concerned that we would be exposed to a situation similar to that which occurred after passage of the Federal Water Pollution Control Act in 1972. The underwriters had no experience with the type of legal and financial liability to which the FWPCA exposed the insured. As three-year policies came due for renewal, insurance underwriters, with very little fanfare or notice to the insured, deleted oil pollution liability coverage from their policies because of the new exposure caused by the FWPCA.

The U.S. underwriters of property and casualty insurance would not cover oil pollution discharges for many years.

ILTA had to go to London to Lloyds' marine market to develop a special insurance program for bulk liquid terminals. When Lloyds left the American market, ILTA's broker was able to get U.S. marine insurers to underwrite the program.

The current insurance crisis has sent premium costs for the insured skyrocketing. In 1984, a policy could be renewed in two days. Today, if the policy can be renewed at all, it takes three months. Premium increases in late 1986, while more modest than those in late 1985 and early 1986, are still substantial.

If U.S. oil spill liability law is made comprehensive, we will have accomplished a major goal. If it also scares the underwriters and they again back away from the market, we will be in an untenable situation with far more uninsured exposure than we had in 1972, and, perhaps, for a more prolonged period, or forever.

Any changes made in oil spill liability for the protection of the environment will be effective only if the insurance industry is willing to underwrite them. It is easier to collect a claim from an insurance company than it is to liquidate an existing "self-insuring" corporation for the assets.

MANDATORY FINANCIAL RESPONSIBILITY

MANDATORY FINANCIAL RESPONSIBILITY FOR TERMINALS CREATES MORE PROBLEMS THAN IT SOLVES

1. The pollution problem that gave rise to the oil spill superfund concept in 1975 was the spilling of oil into the ocean from rust-bucket foreign-flag tankers bringing oil to the U.S. during the 1970's energy crisis.

2. Onshore facilities did not cause the catastrophic spills and national alarm.

3. The U.S. Coast Guard solved the problem by making sure that only seaworthy vessels plied this oil supply trade.

4. The cleanup fund concept proposed to assure that if any massive spills washed ashore, more than adequate money would be available to pay for the cleanup. This was particularly necessary since a spilling tanker might either sink or sail away outside U.S. jurisdiction, leaving no one but the public to pay for the cleanup.

5. Unlike ships, bulk liquid terminals do not sail away outside U.S. jurisdiction. They have a better record than vessels. If they have accidental discharges, they almost always clean them up. If they fail to do so, remedies in the 1972 Federal Water Pollution Control Act are more than adequate to make them comply or pay.

6. Considering this background, ILTA opposes enacting a Mandatory Financial Responsibility (MFR) requirement for onshore facilities for the following reasons:

   a. The existence of the insured business, the jobs of its employees, the distribution of oil to dependent consumers, and the value of the facility as security for loans/debt are subject to the whims of an unpredictable and unconscionable insurance market.

   b. By law, MFR (insurance coverage) becomes a license or permit without which the operator cannot operate or stay in business.

   c. When MFR is either unaffordable or completely unavailable at any price (as it often has been in the current "insurance crisis"), the governments seem equally as inpotent as the uninsured to compel an immediate resolution of the problem by the insurance industry.

   d. Self-Insurance is not a viable solution for small and medium-sized companies if the MFR is set at a high level -- at an amount that exceeds the liquid value of the company.

   e. If the government allows underfinanced Self-Insurance programs, it solves the problem of a company's complying with any MFR requirement in the law, but it short-changes the public and the environment on financial indemnification for oil spill damage and cleanup.

   f. The creation of industry Captive Insurance Programs (CIPs), while a solution for many large corporations (but not all), is not a solution for small companies that, even collectively, are unable to assemble the high initial amount of capital need to finance a CIP.

   g. Legally, if insurance were made mandatory, operators without coverage would have to shut down and not operate -- this means not transfer, store, or distribute petroleum products until they are able to get the required coverage. This could take anywhere from a few weeks to "can't get it." Any lengthy shutdown would force most small and medium-sized operators out of business because their cash-flow would be shut off.

THE INTERNATIONAL OIL POLLUTION SPILL LIABILITY & COMPENSATION FUND CONVENTIONS ARE AN ADMIRABLE CONCEPT, BUT AS CURRENTLY CONSTITUTED REPPESENT AN EXPENSIVE PROPOSITION FOR THE U.S., WHICH WOULD CONTRIBUTE 30% OF THE MONEY TO THE FUND TO CLEAN UP SPILLS ELSEWHERE IN THE WORLD

A March 1984 study, done for the U.S. Coast Guard by Temple, Barker and Sloane, includes a map (see page 6) showing the Main Oil Movements by Sea in 1982. It reveals that most of the oil is moved from the Persian Gulf to Europe, Southeastern Asia, and Japan. There are also significant increments moved from northern Africa to Europe and from the North Sea to Europe and the United Kingdom.

The Oil Spill Intelligence Report notes that in 1983, about 1/3 of the oil spilled in the world came from oil well blowouts in the Arabian Gulf, or 80 million gallons of the total 242 million gallons spilled in 1983.

The way the International Oil Spill Cleanup Convention (begun in 1971) attributes responsibility to pay into its Fund can be characterized as one of serious inbalance. Japan, which signed the conventions at the urging of the U.S., currently contributes 31.3% of the money to the fund, but receives only 15.3% annual compensation for oil spill cleanup.

The TBS study indicates that if the U.S. becomes a party to the International Oil Spill Compensation Fund Convention, according to the March 1984 study, the U.S. financial obligation would be to contribute an amount constituting almost 30% of the total fund. Japan's contribution would drop to 18.5%.

A review of oil spills in U.S. waters from 1971 to 1982 indicates that if the U.S. had been a party to the fund convention since it began, it would have paid in an amount equal to 40% of the total fund and it would have received very little in return since most of the covered spills which occurred were not anywhere near U.S. waters.

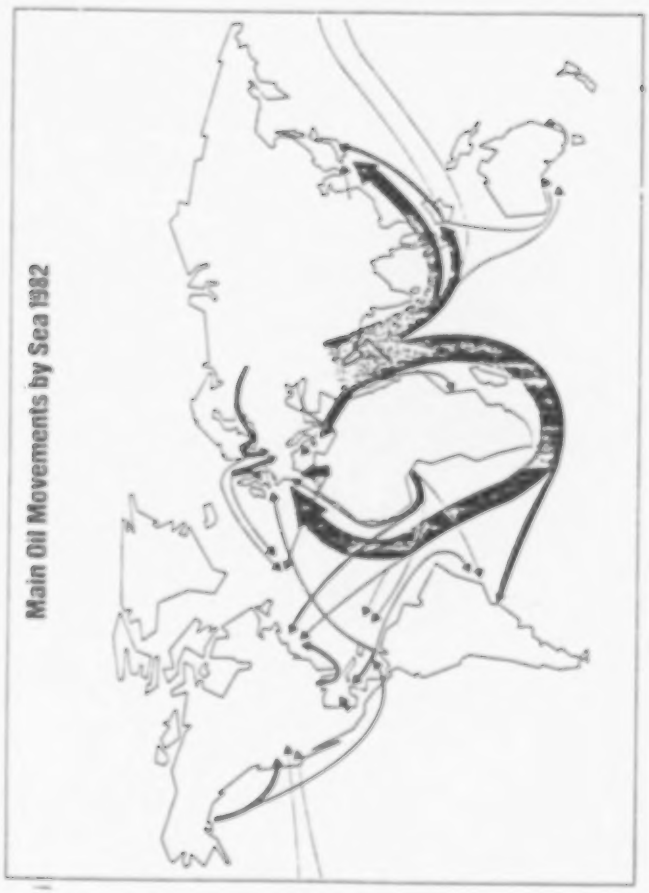
The only way the U.S. could benefit from the International Cleanup Fund if it became a member would be to have a very large catastrophic spill in its waters. The U.S. could achieve the same degree of protection and save money by developing a domestic oil spill fund as proposed in the several bills before the Congress.

In view of the current national deficit, Congress must review whether the American public should be required to pay tens of millions of dollars into an international fund that will be used largely to clean up spills that occur elsewhere in the world, or whether they should pay that money into a U.S. oil spill cleanup fund to be used only to protect U.S. and adjacent shores and waters from oil spill damage.

Another way to phrase it is, "Is the international relations value of participating in and funding the international cleanup fund (which the U.S. was instrumental in developing and encouraging other nations to become a party to) worth the cost in dollars?" Should we save face or save dollars?

The TBS study deals with current International Cleanup Fund Convention membership and levels of liability. It does not include changes in the Fund Convention agreed to in London in 1984. This would increase the amount of the U.S. contribution.

(See page 6 for flow map of Main Oil Movements By Sea in 1982.)


Main Oil Movements by Sea 1982

PRE-EMPTION OF STATES HAS BEEN A MAJOR STUMBLING BLOCK TO ENACTING A COMPREHENSIVE NATIONAL OIL SPILL LIABILITY & COMPENSATION LAW.

ENFORCEMENT OF POLLUTION LAWS IS SUCH A BIG JOB, WE NEED STATE PARTICIPATION.

ONE SOLUTION TO GETTING A COMPREHENSIVE LAW WOULD BE FOR CONGRESS TO REQUIRE STATES TO ADOPT AND ADMINISTER THE FEDERAL OIL SPILL LIABILITY AND COMPENSATION ACT IN THE SAME WAY THEY DO THE THE CLEAN AIR ACT, THE RESOURCE CONSERVATION AND RECOVERY ACT, AND CERTAIN SECTIONS OF THE FWPCA ITSELF.

OVERALL FEDERAL COORDINATION WITH THE STATES WOULD BE CARRIED OUT BY THE COAST GUARD AND THE EPA.

Oil Facilities (terminals, marinas, tank trucks, tank rail cars) are subject to two sets of laws and regulations in 24 states--both state and federal.

In addition, foreign and domestic tankers and domestic barges are subject to federal oil spill laws and a variety of state oil spill laws as they go from U.S. port to U.S. port, or travel in bays or the inland waterways.

In states with oil spill laws and funds, cargo owners are subject to dual fees, both state and federal (CERCLA), on oil/petroleum cargoes.

If a federal oil spill fund is enacted and state laws are not pre-empted, we would have an additional federal oil spill cleanup fund fee inposed on oil cargoes.

Where oil companies can pass these fee costs on to the consumers, the fees, in effect, become a hidden tax on consumers.

While a single national fund would seem to be the simplest way to administer payment of cleanup costs and compensation, it would seem difficult, if not impossible, to phase out state funds at this stage of their existence and growth, because they have become a matter of "politics, emotion, and principle," and a source of revenue.

Administration and enforcement of oil pollution law(s) would be streamlined and more cost-effective if both the federal government and state governments were enforcing the same law.

Further, industry compliance would be easier if we had a uniform national law.

The Congress should require states to adopt, enact, and enforce a national oil spill liability, cleanup, and compensation act which represents a minimum federal standard.

States should be permitted to deviate from this standard law only upon proving to the Administration or the Congress, or both, that the deviation is necessary. This would prevent the re-development of many conflicting state laws and laws whose provisions are inordinately stringent, or are meant to be unnecessarily punitive, or are disruptive of commerce, or are to inflict revenge, or are whimsical, superfluous, non-productive, or just plain unnecessary.

Even where the provisions of these state laws and regulations have more bark than bite, they cause confusion.

One of the keys to providing that oil spill cleanup and damage costs are paid for by the accidental discharger is to make the liability of the law insurable. Conflicting state spill laws designed to frighten companies handling oil are guaranteed to frighten off insurance underwriters.

Mr. Chairman, that concludes my statement. I appreciate the opportunity afforded to me by you, the Committee, and the staff, to present this testimony here today.

STATEMENT OF VIRGINIA'S SECRETARY OF NATURAL RESOURCES
JOHN W. DANIEL, II
BEFORE THE
ENVIRONMENT AND PUBLIC WORKS COMMITTEE
UNITED STATES SENATE
ON S. B. 2340
10 September 1986

On behalf of the natural resources agencies in Virginia, this statement is to convey our position on the pending oil spill liability legislation. Our interest in this legislation focuses on its provisions for compensation of natural resources damaged by spills from ocean-going and inland vessels.

We are particularly concerned about protection afforded the Chesapeake Bay in the event of an oil spill. The Chesapeake Bay is noted as the largest estuary in the nation and, biologically, as one of the most productive systems in the world. An accident anywhere in the Bay but especially in a critical habitat or spawning area could have far-reaching effects in the seafood industry.

We reviewed both the House and Senate versions of this legislation; and, in general, we prefer S. 2340. While the House proposal (passed as Title IV of the Superfund package) preempts state law, the Senate bill preserves state compensation funds regardless of their source and use. It is important that the federal legislation preserve a state's authority to finance oil spill contingency funds by whatever means are most appropriate. Virginia's oil spill law contains liability provisions and civil penalties, and establishes a contingency fund to cover the expenses of cleaning up oil spills and restoring natural resources damaged by such an occurrence.

With the exception of inland barges, we are supportive of the levels of liability coverage proposed in the House Bill and urge that S. 2340 provide similar coverage. The liability limit of $150,000 (or $150 per gross ton, whichever is greater) for an inland barge in the House legislation is too low and should be raised to be commensurate with the damage potential. We would also like to see changes that resemble the Merchant Marine Committee's recently proposed bill (Title IV of the Superfund Bill) to provide states' immediate access to funding sufficient to initiate cleanup and abatement response.

We feel we can support S. 2340 provided that the above provisions are incorporated and no reduction in our current level of protection and compensation will result.

Thank you for providing the opportunity for the Commonwealth to comment on this legislation. We recognize the advantages of a nationally consistent approach to oil spill liability and urge the committee to progress towards resolution during the remaining weeks of this Congressional session.

Statement

of the

American Institute of Marine Underwriters

before the

Senate Environment and Public Works Committee

on

Oil Spill Liability and

Compensation Legislation

(S.2799)

September 12, 1986

AIMU is a non-profit trade association representing 110 marine insurers whose members underwrite over 90% of the marine insurance done in the United States. The American marine insurance market has been involved in insuring pollution liabilities arising from Federal statutory provisions for the past fifteen years. The Water Quality Insurance Syndicate (WQIS), a pool of 24 marine insurers from the American market, insures liabilities imposed on vessel owners and operators by the Federal Water Pollution Control Act Amendments (FWPCA), the Outer Continental Shelf Lands Act Amendments (OCSLAA) and The Comprehensive Environmental Response Compensation and Liability Act (CERCLA). In addition, WQIS insures the liability of vessel owners and operators to third-parties for property damage caused by pollution.

In conjunction with coverage of the liabilities under FWPCA and OCSLAA, WQIS provides the Coast Guard with the evidence of insurance required by vessel operators for certification of financial responsibility. In total, WQIS insures liabilities from oil or hazardous substance pollution for over 16,000 vessels operating primarily in the inland and coastal waters of the United States.

There are currently at least three insurance facilities or pools as well as several individual companies within the American market which underwrite risks for mobile drilling vessels and fixed offshore installations located on the Outer Continental Shelf and elsewhere throughout the world. Their coverages include pollution exposures.

These pools and companies provide an alternative United States insurance market for the offshore oil industry.

We offer our views on S. 2799 on the basis of the unique experiences and perspectives of the American marine insurance market. Simply stated, the American marine insurance market seeks a truly comprehensive, preemptive national system in which reasonable liability limits are clearly defined and ascertainable, with the preservation of adequate and fair defenses under the law. Unfortunately, S. 2799 falls far short of this mark. The bill presents many serious problems for both vessel owners and insurers. It should not be hastily adopted without adequate review and comment. The American marine insurance market must oppose the bill in its current form. We have organized our comments on the bill around certain basic headings.

Comprehensiveness

One of the basic goals in enacting an oil Superfund is to preempt or supercede existing statutes relating to oil spill liability and create a truly comprehensive system. There are a number of sections in the bill which indicate that this oil Superfund scheme would not be the sole source of recovery in the event of a spill. In Section 102(g), the owner or operator of a vessel would apparently be liable both under the oil Superfund bill and under the maritime tort system for spills. If this federal scheme is not to preempt other federal and state liability systems, what is the point of enacting it? The situation is already

confused enough without adding another layer. In Section 105(c), state courts are given jurisdiction over suits under the proposed federal oil spill system. This will make a consistent interpretation of the bill virtually impossible and is a step backward from existing admiralty practice. Jurisdiction should be exclusively in the federal courts. Furthermore, the bill permits the existing oil pollution statutes to exist independent of the new bill. All current references to existing oil spill statutes should be eliminated and the comprehensive oil Superfund should stand on its own.

From the point of view of vessel owners and insurers, this bill cannot be considered comprehensive because it covers only spills of petroleum. Hazardous substances require another certification procedure under FWPCA and/or CERCLA. We believe that only one comprehensive scheme should be employed covering both spills of oil and hazardous substances from vessels.

Preemption

It is vital to the workability of the oil "Superfund" proposal that it establish a uniform and exclusive statutory scheme covering oil pollution on and in navigable waters and for claims for damages caused thereby. It must preempt state laws in order to eradicate the existing patchwork of conflicting and confusing federal and state law. Vessels must be free to move freely from one state jurisdiction to another without the burden of meeting financial

responsibility requirements in each separate state and without being subjected to multiple regimes of law imposing varying degrees and limits of liability.

It is imperative that any federal oil pollution compensation act preempt the conflicting maze of state pollution liability and compensation schemes which have arisen throughout the nation. Waterborne commerce is an activity essential to the public interest which depends upon uniform conditions of operation throughout the United States. It is unnecessarily burdensome, particularly for the small and medium size operator, to require compliance with varying regulations in every jurisdiction within the United States.

The House version of the oil Superfund bill contains a viable preemption provision. S. 2799 is unacceptable on the issue of preemption.

Limitation

This bill would radically increase the limitation amounts particularly for vessels carrying oil. It should be obvious that such a substantial increase in potential liability must be reflected in rates and that this will be reflected in increased costs for the vessel owners and operators. It would appear that these increases would most seriously impact upon tank barges. Based upon our experience over the last fifteen years, we can state that in all but a handfull of cases, the existing limitations

were sufficient to provide adequate funds for spills caused by tank barges. Consequently, we believe that the proposed increases in limitation amounts are totally unwarranted. We believe that such increases in limitation are necessary and will impose an unwarranted burden on maritime commerce. We also urge that the category of inland oil barge be continued and that the liability limits be the same as in the House bill.

Section 102(c)(4)(B) permits the administration to adjust the limits of liability periodically based upon the Consumer Price Index. We believe that this is a matter which is better left to Congress and international treaty. There are certain other provisions which make the limitation for the vessel owner unclear. For instance at Section 103(e)(3) a spiller is liable for the costs of recovering any compensation paid. It is not clear whether or not, if the vessel owner or operator is exonerated, can he still be held liable for such costs?

Entitlement to limitation

Section 102(c)(2)(B) provides that a responsible party is not entitled to a limitation if he "fails or refuses" to report a spill or to provide "all reasonable" cooperation requested by a responsible official. We see two potential problems with the application of this provision. First, an owner of a vessel may not have immediate knowledge of a spill and, therefore, may not be able to report it. To deny a vessel owner his limitation in such a situation seems grossly unfair.

Second, we are concerned about what action must be taken to constitute "all reasonable" cooperation. If a vessel owner or operator has limited financial resources and if the cost of completing the cleanup is beyond his ability to pay, would he fail to provide "all reasonable" cooperation if he is forced to ask the government to take over cleanup?

Defenses

One important consideration for insurers is the maintenance of adequate defenses. The current defenses provided in FWPCA have been eroded even though experience lends no support to the narrowing of these defenses. Section 102(b)(1)(C) provides that there would be no liability if the incident is "solely" caused by an act of a third party other than "one whose act or omission occurs in connection with a contractual relationship..." It is improper and contrary to tradition in maritime law to hold a "dumb barge" innocent of any wrongdoing, responsible for a spill caused by a towing tug. The existence of a simple towing contract between the tug and the barge should not justify the denial of the traditional third-party defense. This is a radical change in the traditional concept of the liability of a tower under contract to a barge owner. See generally The Law of Tug, Tow and Pilotage, 2nd Edition (1982) by Alex L. Parks, page 22 et seq.; The Law of Admiralty, 2nd Edition (1975) by Grant Gilmore and Charles L. Black, Jr. at page 516; See for example, The Fort George, 183 F. 731 (2nd Cir. 1910), cert. denied, 219 U.S. 589,

31 S.Ct. 472 (1911).

There are other instances in which the operation of this provision would be unfair. Often an oil company will contract with a vessel owner for transportation of oil. If there were a spill from the vessel due to negligence of the oil company's shore side personnel or due to defective terminal equipment during the loading or unloading of cargo, the oil company would not be a third party under the draft. The vessel, by virtue of the contract with the oil company, could not avail itself of the defense that the oil company was a negligent third-party who caused the spill.

With respect to defenses to liability in general, requiring that an incident be caused "solely" by someone or something before a defense would be available is unjust. A comparative negligence standard, i.e. the apportionment of liability to the extent that an incident is caused by someone, would be more consistent with settled principles of maritime law.

Section 102(b)(2) essentially deprives a tanker owner or operator the benefit of the third party defense since he must pay whether or not a third party is solely responsible. The operation of this provision is unfair and is further support for including the non-spilling vessel in the oil Superfund scheme (see discussion below).

We also believe that there should be specific mention of negligence on the part of the United States Government as a defense. It is arguable that the third-party defense as it is drafted would include government, but we believe it would be preferable to specifically say that negligence

on the part of the United States Government is a defense. See FWPCA §311(f)(1)(C).

In Section 104(d), an insurer is denied defenses to a direct action which were accorded to insurers under FWPCA. Despite misdeclarations or fraud by an assured and consequent acceptance of a risk which might otherwise have been rejected, an insurer might be subject to much higher exposure than anticipated. This flies in the face of traditional general insurance law. We recommend that the Section be amended to parallel FWPCA §311(p)(3):

> "..the guarantor shall be entitled to invoke all rights and defenses which would have been available to the owner or operator if an action had been brought against him by the claimant, and which would have been available to him if an action had been brought against him by the owner or operator."

Liability of non-spilling vessel

There is no provision for the application of the oil Superfund scheme to a vessel which causes a spill from another vessel, through collision or otherwise. We believe that this is a serious deficiency. Section 102 provides that the owner or operator of the vessel from which oil is discharged or which poses a threat of discharge is liable for damages. There appears to be no provision parallel to §311(g) of FWPCA which sets out the liability and limitations of a third party, such as a non-spilling vessel which causes a spill from another vessel. Of course, all vessels over 300 gross tons (except a dumb barge not carrying

oil) would be required to maintain evidence of financial responsibility under the proposed bill. The financial security would be available to the government and other claimants for settlement of claims only if the actual spiller is liable under §102. Without a provision similar to §311(g), claimants could be faced with unsecured claims and there would be a question as to what regime of law would apply to the non-spilling, causing vessel.

Guarantor's limitation of liability on a direct action

Section 104(e) should be amended as follows:

> "(d) Nothing in this title shall impose liability with respect to an incident on any guarantor for damages or removal costs which exceeds in the aggregate the amount of financial responsibility which that guarantor has provided the owner or operator for the vessel or facility from which the oil was spilled or which is liable under this Act. ~~Nothing in this subsection shall be construed to limit any other statutory, contractual, or common law liability of guarantor to any responsible party for whom such guarantor provides evidence of financial responsibility including, but not limited to, the liability of such guarantor for negotiating in bad faith a settlement of any claim.~~"

It is imperative that the guarantor's limit of liability be clearly defined in order for risks under the bill to be insurable. Each vessel is insured separately. It is not the aggregate amount of the monetary limits of the policy of insurance provided which

is the limit but the amount for the particular vessel or facility involved in the incident. Certainly, if the vessel owner has more than one vessel and only one is involved in the incident, the guarantor should not be held to the total amount of insurance coverage he has provided for all of the vessels or facilities belonging to that owner. We believe that the suggested change in language would clarify this point. We are also proposing that the language regarding good faith be dropped altogether because it is unnecessary and creates further uncertainties as to the limitation of the guarantor.

Double jeopardy

The failure to provide a vehicle for the recovery of all funds expended in excess of the spiller's liability limit on cleanup is another serious gap in the legislative scheme. Section 102(c)(2) exposes the owner or operator to unlimited liability for failure to provide removal action upon order of a responsible official. There is no provision permitting the owner or operator to recover cleanup costs in excess of his limit. Under this bill, the spiller is on the horns of a dilemma. Despite the liability limitations in §102(c)(1), if the spiller undertakes cleanup himself and the costs exceed his liability limit, there may be no way for him to preserve his limit. If the spiller does not undertake cleanup and leaves it to the government, he may expose himself to potential unlimited liability for failure to provide reasonable cooperation. If the

spiller undertakes cleanup for his own account up until he reaches his liability limit and then allows the government to assume responsibility for clean up, he may expose himself to double liability. The government may charge him for costs of removal even though the spiller has already paid for removal costs up to his limit. Failure to be credited for such funds expended results in liability double that as set out in the statute. The bill should be amended to clarify that the owner or operator may be a claimant against the fund for any removal costs he may incur in excess of his limit.

Definitions

The definition of "owner or operator" found at Section 101(19) does not encompass vessels as currently drafted.

Thank you for this opportunity to contribute the American marine insurance market's views on a matter of such importance.

The American Waterways Operators, Inc.

Executive Offices

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Suite 1000
Arlington, VA 22209

Tel: 703 841 9300

September 15, 1986

Honorable Robert T. Stafford
Chairman, Environment & Public Works Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The American Waterways Operators, Inc. (AWO), the national trade association of the inland and coastal barge and towing industry, submits these comments on oil spill liability, cleanup and compensation legislation. We ask that our comments be included in the hearing record.

AWO has long supported enactment of comprehensive oil pollution legislation which will provide prompt and fair compensation for cleanup costs, third party damages, and injury to natural resources caused by oil spills, and is on record in support of H.R. 1232, as passed by the House Merchant Marine and Fisheries Committee, and its predecessor bills in previous Congresses. We are gratified, Mr. Chairman, that you and other members of this committee have endorsed the concept of a comprehensive oil spill regime.

At the same time, we are disappointed that neither S. 2340 or S. 2799 reflect the carefully crafted compromises which have been developed over the years and which, if enacted, would result in a law which is equitable, workable and provides just compensation to injured parties with legitimate claims to the fund.

The barge and towing industry cannot support legislation which does not include:

(1) Reasonable, insurable liability limits: liability limits as proposed in H.R. 1232 and H.R. 5300 would provide ample positive incentives to industry to exercise a high degree of care in transporting petroleum and petroleum products while still allowing this cargo to move in commerce at reasonable rates. AWO continues to support lesser limits of liability for inland oil barges, as currently provided under P.L. 92-500 as amended. Inland oil barges, in most instances, move in tows made up of multiple barges. Each barge in the tow carries its own liability requirements, rather than the whole tow carrying a single liability limit.

As proposed in both S. 2340 and S. 2799 liability limits for inland oil barges would unacceptably increase; in S. 2799, from present levels of $125,000 to $10 million. Yet the record indicates that virtually few spills cannot be cleaned up for the limits currently in effect under the Federal Water Pollution Control Act.

Statistical information compiled between May 1971 and May 1985 by the Water Quality Insurance Syndicate (WQIS) relating to spills from inland oil barges, provides strong justification for retaining lower limits of liability for inland oil barges. WQIS, a pool of 28 marine insurers from the American market, insures liabilities imposed on vessel owners and operators by the Federal Water Pollution Control Act Amendments (FWPCA), the Outer Continental Shelf Lands Act Amendments (OCSLAA), and the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). In addition, WQIS insures the liability of vessel owners and operators for third-part property damages caused by pollution incidents. In total, WQIS insures liabilities from oil or hazardous substance pollution for over 19,000 vessels operating primarily in the inland and coastal waters of the U.S.

In the above-referenced 14-year period, WQIS has received 2,094 reports of oil spills from tank barges which it has insured. Of these recorded spills --

- o 1,896 resulted in cleanup costs;
- o 13 resulted in cleanup costs in excess of applicable statutory limitations (or .62 %) and
- o 6 resulted in damage claims by third parties (note: four of these vessels were <u>not</u> inland oil barges).

For those spills where cleanup costs exceeded the statutory limitation, liability under FWPCA is listed in the attached Appendix A, as is the proposed limitation under H.R. 1232, the Comprehensive Oil Pollution Liability and Compensation Act. This information is also included for those incidents involving third-party damage claims.

Although our industry's cleanup record is commendable, I believe, barge owners have not escaped the insurance affordability and availability crisis which is so pervasive in our nation today. Liability limits for inland oil barges of $10 million would make it impossible for many barge operators to obtain insurance at an affordable cost, irregardless of their spill record. The purpose of the fund is to provide a system of cleanup, liability and compensation for catastrophic spills - those incidents with cleanup costs and damages far exceeding any reasonable limits of liability.

Each oil-carrying barge, regardless of where it operates, must be inspected annually by the Coast Guard to guarantee the integrity of the hull for purposes of seaworthiness, safety and environmental protection.

There is no limitation of liability where spills occur as a result of gross negligence or willful misconduct within the privity or knowledge of the owner or operator, nor could liability be limited when a spill occurs because of a violation of the owner or operator of applicable Federal standards or regulations related to the safety, construction or operation of the vessel, or if there is a failure to report or refusal to participate in ensuing cleanup operations.

(2) Strong Federal Pre-emption: Regarding the merits of the relationship between Federal and State governments in the field of oil pollution liability, AWO believes that strong federal preemption is the essential cornerstone of this legislation. It is imperative that our American-flag ships and barges engaged in interstate commerce face uniform regulations and laws. Currently, a patchwork of varying requirements exist on the international, federal, state and local levels which the full Merchant Marine and Fisheries Committee has characterized as "...a highly inequitable situation for potential victims of oil spill incidents and chaos for those oil-related companies and marine insurance firms seeking to cope with the bewildering thicket of new laws" (House Report No. 97-120, Part I).

As the Committee on Environment and Public Works strongly favors the retention of state oil spill funds, AWO urges that these funds not be duplicative of the functions authorized by the federal law under consideration. Individual states would not be precluded from retaining or establishing a fund to purchase pollution abatement equipment, or a fund for the prevention or detection of pollution, such as environmental monitoring or response programs.

Without preemption, an oil spill cleanup, compensation and liability fund would not represent a solution. We agree with other witnesses who have stated that, without strong federal preemption, there is no need for legislation.

(3) Spiller on the Front Line: AWO fully supports the concept of putting a spiller to the test of responsibility by permitting the spiller to cleanup and mitigate the effects of his own spill. We believe, however, that the spiller should be allowed to be a claimant against the fund for legitimate expenses incurred above his liability limits, as provided for in H.R. 1232 and H.R. 5300. Such a provision will also serve as an incentive for a spiller to act promptly to clean up his spill.

(4) Limitation on Compensable Damages: Legitimate claims for cleanup, damage and, where possible, restoration of natural resources should be promptly and adequately compensated. The compensable damages in S. 2340 and S. 2799 are much broader and speculative in scope. Speculative damages should not be included in the coverage of the legislation. Again, AWO believes that H.R. 1232, as reported by the House Merchant Marine and Fisheries Committee, contains an equitable and realistic listing of compensable damages.

AWO appreciates the opportunity to comment on this legislation.

Sincerely,

Joseph Farrell
President

cc: Members, Environment and Public Works Committee

APPENDIX A

CLEAN-UP IN EXCESS OF TONNAGE LIMITATION

DATE	VESSEL	G.R.T.	LIMITATION FWPCA	LIMITATION H.R. 1232	CLEAN-UP COSTS
3/9/73	PC 2901	1,670	$ 167,000	$ 250,500	$ 542.018
6/22/74	ABC 2311	1,216	121,600	182,400	954,500
7/9/74	TM 10	1,150	115,000	172,500	520,350
1/29/75	TS 86 & TS 87	1,828 1,748	357,600	536,400	1,101,953
4/25/75	BUTANE	1,324	132,400	198,600	278,648
8/10/75	SHAMROCK	575	57,500	150,000	462,100
2/2/76	STC 101	1,223	122,300	183,450	520,000
5/19/76	E-17	1,012	101,200	151,800	516,944
6/25/77	MM-102	1,579	157,900	236,850	455,236
10/31/77	STCO 213	1,343	134,200	201,300	197,758
3/16/80	HBL 3011	1,535	191,875	230,250	754,510
4/16/80	LTC 62	1,328	166,000	199,200	568,276
4/26/83	TT 7001	814	125,000	150,000	241,310

INCIDENTS INVOLVING POLLUTION DAMAGE CLAIMS

DATE	LOCATION	VESSEL	G.R.T.	FWPCA	H.R. 1232	CLEAN-UP COSTS	DAMAGE CLAIMS
2/12/78	Astor, Fla.	EAC 152	1,563	$ 195,375	$ 234,450	$ 5,600	$ 4,000
7/13/78	St. Mark's, Fla.	VBS 101	875	125,000	150,000	111,295	42,650
11/5/79	Quincy, Mass.	GEORGE T. TILTON*	4,361	654,150	3,000,000	66,000	22,628
6/27/80	St. Ptrsbrg, Fla.	DOMAR 118*	5,869	880,350	3,000,000	123,305	7,000
11/3/80	St. Mark's, Fla.	RT 98*	1,096	250,000	3,000,000	85,660	28,554
10/26/83	Tonawanda, N.Y.	HANNAH 6301*	3,127	469,050	3,000,000	8,060	12,500

* NOT Inland Oil Barge

STATEMENT OF EDWIN H. POWELL,
CHAIRMAN OF THE BOARD
OF THE TRANS-ALASKA PIPELINE LIABILITY FUND,
BEFORE THE SENATE COMMITTEE
ON ENVIRONMENT AND PUBLIC WORKS,
REGARDING S. 2340 and S. 2799,
COMPREHENSIVE OIL SPILL LIABILITY
AND COMPENSATION LEGISLATION

SEPTEMBER 10, 1986

As Chairman of the Board and Administrator of the Trans-Alaska Pipeline Liability Fund (Liability Fund), I am submitting this statement on behalf of the Liability Fund. The Liability Fund, which was incorporated by Congress for a specific limited purpose, does not have an official position on the merits of establishing the comprehensive federal oil spill liability fund contemplated by S. 2340 or S. 2799. However, the Liability Fund would like to take this opportunity to recount its history, to explain its purpose and to inform the Committee as to its position on the disposition of its assets in the event that legislation is enacted which results in the termination of the Liability Fund.

HISTORY

In 1973, the Arab oil embargo heightened congressional awareness of the need for prompt construction of the Trans-Alaska Pipeline System (TAPS). The TAPS project had been proposed by eight companies to transport the large Prudhoe Bay oil discovery from the North Slope to Valdez, Alaska, where tankers would onload it and convey it to lower-48 markets. At that time, the

pipeline project was embroiled in litigation over the legality of the width of its right-of-way and over the Department of the Interior's compliance with the newly enacted National Environmental Policy Act in issuing the right-of-way. Of particular relevance to the history of the Liability Fund is the position which some Senators and Representatives took during Committee hearings that the pipeline should be located across Alaska and Canada and terminate in the area of the northwestern United States. Such a route would have avoided the marine leg of the proposed project.

The Congress determined to expedite the processing procedure for the TAPS project as proposed by the companies. It not only amended the Mineral Leasing Act to provide for wider federal rights-of-way, but it also enacted the Trans-Alaska Pipeline Authorization Act to mandate the issuance of all necessary government authorizations for the TAPS project. That Act also established the Trans-Alaska Pipeline Liability Fund, 43 U.S.C. § 1653(c)(4)(1982). There is no legislative history which explains the congressional purpose and intent of this subsection because it was introduced during the conference committee meetings; we have only the language of the subsection and the circumstances surrounding the enactment of the Authorization Act.

The language states clearly that a non-profit corporate entity shall be formed to administer what is, in effect, a

private insurance policy. The relevant sections of the Act state:

> (1) Nothwithstanding the provisions of any other law, if oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel (jointly and severally) and the Trans-Alaska Pipeline Liability Fund established by this subsection, shall be strictly liable without regard to fault in accordance with the provisions of this subsection for all damages, including clean-up costs, sustained by any person or entity, public or private, including residents of Canada, as the result of discharges of oil from such vessel.
>
> * * * * *
>
> (4) The Trans-Alaska Pipeline Liability Fund is hereby established as a non-profit corporate entity that may sue and be sued in its own name. The Fund shall be administered by the holders of the trans-Alaska pipeline right-of-way under regulations prescribed by the Secretary. The Fund shall be subject to an annual audit by the Comptroller General, and a copy of the audit shall be submitted to the Congress.
>
> (5) The operator of the pipeline shall collect from the owner of the oil at the time it is loaded on the vessel a fee of five cents per barrel. The collection shall cease when $100,000,000 has been accumulated in the Fund, and it shall be resumed when the accumulation in the Fund falls below $100,000,000.

43 U.S.C. § 1653(c)(1),(4),(5)(1982).

The lawmakers, who advocated the Canadian route for the project, wanted to ensure that the shippers of TAPS oil would make good on their assertion that the marine leg of the route was safe and that adequate resources would be available to clean up any oil spills and pay for damages. To do this they simply

placed into the law a mechanism to back-up the promises that the shippers had already made. Call it a bond, call it a forced insurance policy; what the Liability Fund boils down to is a corporation with a discrete function: to collect money from a limited number of shipper companies to provide back-up funds for any waterborne spills of the TAPS oil of these same companies. Thus, the Liability Fund is a fiduciary in two respects: (1) to maintain and nurture the monies contributed by the shipper companies and (2) to pay legitimate claims to persons damaged by any spill of TAPS oil belonging to those shippers.

PROCEDURES

The Liability Fund did not begin to operate until 1977 when the construction of the pipeline was completed and the flow of oil through TAPS commenced. At that time, each of the holders of the right-of-way designated a representative to serve on the Board. Counsel for the Board met with the Department of the Interior staff to prepare regulations for the Liability Fund as required by law. The first official Board meeting was held in the District of Columbia on August 9, 1977. The Board has met at least three times a year since that time.

Pursuant to 43 U.S.C. § 1653(c)(5), the shippers began paying the required five cents a barrel on the first oil through the Trans-Alaska Pipeline System. Each carrier collected the fee from its shippers and made monthly wire transfers of the money to the Liability Fund's bank account. Inasmuch as the value of the

Liability Fund reached the statutory limit of $100,000,000 in August 1981, no fee has been assessed since September 30, 1981.

The Board has engaged investment managers to ensure the prudent and most profitable employment of the Liability Fund's assets.

DISPOSITION OF ASSETS

Senate bill 2340 proposes to terminate the Trans-Alaska Pipeline Liability Fund and to place its assets in the new Oil Spill Liability Fund. The trustees of the Fund have a fiduciary duty to protect the assets which were contributed by the shippers to the Liability Fund, and this duty requires us to object to any attempt to transfer Liability Fund assets to the federal treasury. The funds are the corpus of a private corporation and, as such, the Trustees feel an obligation to protect them from waste and fraud. Even a congressional command to move the Liability Fund's assets to the federal Treasury, we believe, and are advised by counsel, would raise serious constitutional and other issues which would doubtless result in litigation.

The basis for our position is quite simple. The Trans-Alaska Pipeline Liability Fund was chartered by Congress as a non-governmental corporation to ensure that a fund is maintained by purchasers of North Slope oil to meet their potential liability to those injured by accidents arising out of the shipment of the oil. The corporation is private in nature and purpose. Like many other private corporations, though it is regulated by the government to guard against certain risks to the

public interest, it is not a governmental entity. In fact, the Liability Fund found it necessary to seek a ruling that it was a tax-exempt corporation under 501(c)(4) of the Internal Revenue Code because of the possibility that its income would be taxed. Its assets consist entirely of contributions from pipeline users and income generated through investments by the Board of Trustees administering the Trans-Alaska Pipeline Liability Fund. The Board, the majority of whose members are appointed by the private companies holding the TAPS right-of-way, continues to appoint its own administrator, adopts its bylaws and budget, determine the character, necessity and method of payment of the Trans-Alaska Pipeline Liability Fund's obligations and expenditures, and ensure that the Trans-Alaska Pipeline Liability Fund conforms to the laws of the states in which it operates. The Liability Fund's assets have never been a part of the Federal Treasury; rather, they have been controlled at all times by the Board and maintained as a source for compensating those injured by accidents in shipment, not for any public purpose.

In view of the private character of the Liability Fund and its assets, the transfer of those assets to any new fund by Act of Congress may well raise constitutional questions of taking private property without just compensation and due process. The money has been generated and held not for public use but for a private purpose serving the public interest. The transfer proposed by S. 2340 would completely deprive the corporation of its property. It is fundamental that the government may not take

private property for its use or for the use of any other private party without due process and just compensation.

Moreover, an issue of fairness is raised by the use of the Liability Fund's assets to capitalize any new oil spill fund. The purpose of a comprehensive oil spill liability fund is to provide coverage for oil spill clean-up caused by all owners or operators of vessels transporting petroleum or petroleum products. If the Liability Fund's assets are transferred to the new fund, the Congress in effect will be requiring shippers of Prudhoe Bay crude oil to supply the seed money -- actually a significant percentage of the total new fund's statutory limit -- for the entire oil industry. Some of those TAPS shippers are small producers; some are no longer in the business of transporting petroleum products. And even those shippers who are neither should not bear the burden of the entire industry.

Inclusion in the Senate bill of a provision for rebate of the Liability Fund's assets to those companies which paid into it would avoid a conflict for the Trustees and would insure that all companies who would benefit from the new Fund are required to support it. For this reason we would urge the Committee to agree to the language in S. 2799 as it concerns the disposition of the Liability Fund.

I am also concerned that none of the bills before the Committee provide adequate legal protection to present and former officers and trustees of the Trans-Alaska Pipeline Liability Fund from liability for their non-negligent acts. The Liability Fund

Board of Trustees is made up of one member from each of the permittees (8 pipeline company representatives) and three members designated by the Secretary of the Interior. Once appointed, all board members assumed a fiduciary responsibility in carrying out their prescribed legal duties and served in the public interest. If the Fund is terminated, the Trustees' liability should also cease and the new fund should take on that responsibility.

While S. 2799 does provide transfer of liability for Trustees appointed by the Secretary, it does not provide the same coverage for Trustees appointed by the TAPS Permittees. Since each member serves on the Board in his or her individual, not corporate, capacity, each person would be subject to personal liability in the event of a lawsuit. Should such a lawsuit be filed, it is possible that that person would not be associated with the entity which appointed him or her to the Board -- either a pipeline company or the Secretary of the Interior -- and yet would be personally liable for actions taken while acting on the Board. It is only fair and appropriate, upon termination of the Liability Fund, to provide that all former board members not be subject to such personal liability other than liability for gross negligence or willful misconduct. The language in section 201 (d) of S. 2799 could satisfy this concern by merely deleting the phrase "who were designated by the Secretary of the Interior."

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Although the Liability Fund is fortunate in that it has not yet been called upon to certify claims and make payments to

claimants, the Board is proud of its record of preservation of assets at a low maintenance cost. The Congress acted wisely in establishing the Liability Fund and providing it with the flexibility to insure a reasonable rate of return on the shippers' assets. The Board earnestly hopes that the Congress will again act wisely, and equitably, in permitting the disbursement of the assets of the Liability Fund to those companies to whom they rightfully belong.

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